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# Personhood, Jurisdiction and Injustice: Law, Colonialities and the Global Order\*

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*Set against the colonial and neo-colonial unevenness of the globalised neoliberal order, this article offers a critical reading of legal personhood and jurisdiction as mechanisms of privilege and predation. Transnational corporations (TNCs) are, we suggest, the ultimate insider construct for the neoliberal capitalist-techno order. Meanwhile, increasing numbers of corporeal human beings on the move as the marginalised products of that same order (especially refugees and migrants) are confronted by boundaries and barriers all too material in their effect. In an age of anxiety-driven border-hardening against mass human migration and of seamless, instantaneous movements of transnational capital and corporate location across jurisdictional boundaries, we examine the patterns of injustice implicated in and between these phenomena, tracing a Eurocentric logic visible in the complex continuities between coloniality, capitalism and the production of precarity in the Anthropocene.*

**Keywords:** *Legal personhood; jurisdiction; walls; coloniality/ neocoloniality; neoliberalism; transnational corporations; privilege; predation.*

## 1 INTRODUCTION

In this article, we offer a critical reading of personhood and jurisdiction set against the globalised juridical order and the stark contrast between the privilege of transnational corporations (TNCs)<sup>1</sup> and the barriers and exclusions facing marginalised, corporeally specific human beings.<sup>2</sup> We trace threads of continuity between the colonial past, the neoliberal present, and the functions of legal personhood and jurisdiction as mechanisms of exclusion and control.

The scale of the global is, of course, central to Anthropocene, and Haraway—pointing this out, has also rightly argued that the global is *highly specific* in its historical and material origins and development.<sup>3</sup> Folded into the antecedents of Anthropocene crises—including climate change as the Anthropocene’s ‘most salient and perilous transgression of Holocene parameters’<sup>4</sup>—lies the colonial past and a neocolonial present.<sup>5</sup> Deepening levels of human

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<sup>1</sup> TNCs enjoy considerable, organised advantages in the world order. See, for a useful discussion, JG Ruggie, ‘Multinationals as global institution: Power, authority and relative autonomy’ (2017) *Regulation & Governance*, (doi: 10.1111/rego.12154. Date of last access: 26<sup>th</sup> November 2018).

<sup>2</sup> S Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Cambridge, Mass: Harvard University Press, 2014). Pressures are only likely to multiply with climate change driven displacements and deepening insecurity: J Barnett and WN Adger, ‘Climate change, human security and violent conflict’ (2007) 26 *Political Geography* 639–655.

<sup>3</sup> D Haraway, ‘Anthropocene, Capitocene, Chthulucene: Staying with the Trouble’, a lecture given by Donna Haraway at University of California, Santa Cruz on 5th September 2014, available at <https://vimeo.com/97663518> (last accessed 26th November 2018), 14.02.

<sup>4</sup> A Malm and A Hornborg, ‘The Geology of Mankind? A Critique of the Anthropocene Narrative’ (2014) 1/1 *The Anthropocene Review* 62–69, 63.

vulnerability have been directly related to neoliberal globalisation,<sup>6</sup> and the antecedents of contemporary injustices—including climate injustices—have been directly related to well-rehearsed, highly uneven distributions of life and death in patterns of capitalist coloniality reflected in the industrialisation and plunder<sup>7</sup> intensifying the trajectory towards the Anthropocene.<sup>8</sup>

In this article we are particularly concerned to foreground the unevenness of processes of neoliberal globalisation,<sup>9</sup> and it is against this unevenness that we position our reflections on personhood and jurisdiction. Our particular interest in writing this reflection first emerged from noting the marked contrast between TNCs as highly mutable, mobile agents of the global order, and the rapid proliferation of walls and barriers confronting human beings on the move in the ‘the age of walls’.<sup>10</sup> We refer to ‘TNC privilege’ as a way of expressing the fact that TNCs have unrivalled levels of juridical privilege and power to evade jurisdictional responsibility.<sup>11</sup>

The link between globalisation and the proliferation of walls is reflected by the recent success of ethno-nationalist populist politicians capitalising on the sense that unaccountable transnational forces negatively impact upon livelihoods and life prospects.<sup>12</sup> Resurgent forces of populist nationalism in Europe and the United States of America have gained ground in significant part by explicitly appealing to (selective) critiques of globalisation.<sup>13</sup> At the same time, there is a growing collective sense that the current international order systematically favours the interests of a relatively small transnational neoliberal elite (the ‘1%’)<sup>14</sup> while producing unprecedented levels of precarity for the masses.<sup>15</sup> In the light of this particular, contemporary manifestation of global unevenness, we decided to explore the idea that the mechanisms of personhood and jurisdiction operate in favour of corporate capital at both structural and ideological levels—and that the contrast between TNC privilege and the relative excludability of marginalised human beings should be seen as a co-symptomatic dynamic with shared roots in a particular order of meaning and power.

Drawing—in part—on Third World Approaches to International Law (TWAAIL), postcolonial and decolonial critical scholarship, we examine personhood and jurisdiction as concepts and technologies intimately related to the intellectual, theological and political traditions

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<sup>5</sup> ‘The Anthropocene is the outcome of five hundred years of dispossession, capitalist accumulation, and neo/colonial globalization’: A Kanngieser and N Beuret, ‘Refusing the World: Silence, Commoning and the Anthropocene’ (2017) 116/2 *The South Atlantic Quarterly* 362-380 at 376; S Lewis and M Maslin, ‘Defining the Anthropocene’ (2015) 519/7542 *Nature* 171–80.

<sup>6</sup> P Kirby, *Vulnerability and Violence: The Impact of Globalisation* (London, Ann Arbor: Pluto Press, 2006); Sassen (n 2).

<sup>7</sup> Lewis and Maslin (n 5).

<sup>8</sup> For a discussion linking this point to the Anthropocene, see Malm and Hornborg (n 4).

<sup>9</sup> R Radhakrishnan, *Theory in an Uneven World* (Blackwell, Oxford 2003).

<sup>10</sup> T Marshall, *The Age of Walls: How Barriers Between Nations Are Changing Our World* (New York: Scribner, 2018).

<sup>11</sup> For a comprehensive study of TNCs, see P Muchlinski, *Multinational Enterprises and the Law* (Oxford: OUP, 2007), especially at 125-171; C Jochnick, ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’ (1999) 21 *Human Rights Quarterly* 56-79; and for two salutary examples, U Baxi, ‘Writing about impunity and environment: the “silver jubilee” of the Bhopal catastrophe’ (2010) 1/1 *Journal of Human Rights and the Environment* 23-44; S Joseph, ‘Protracted lawfare: the tale of Chevron Texaco in the Amazon’ (2012) 3/1 *Journal of Human Rights and the Environment* 70-91.

<sup>12</sup> See, for a well-established critique of such patterns, J Stiglitz, *Globalisation and its Discontents* (New York and London: WW Norton, 2002).

<sup>13</sup> See, for example, GC Hufbauer and C Cimino-Isaacs, ‘Trump versus Globalization’ (2017) 26 *The Cairo Review of Global Affairs* 28-39. On the selectivity of appeals against globalisation, see Q Slobodian, ‘Trump, Populists and the Rise of Right Wing Globalization’ (2018) *New York Times* October 22<sup>nd</sup> 2018.

<sup>14</sup> Oxfam figures on wealth are salutary: The 2017 report is available here: <https://www.oxfam.org.uk/media-centre/press-releases/2017/01/eight-people-own-same-wealth-as-half-the-world> (date of last access: 19<sup>th</sup> May 2018).

<sup>15</sup> For a discussion of this and the related rise of a ‘global precariat’, see G Standing, *The Precariat: A New Dangerous Class* (London: Bloomsbury 2011). For further discussion of the dangers to democracy presented by neoliberal globalisation and the emergence of widespread precarity, see S Nasstrom and S Kalm, ‘A democratic critique of precarity’ (2015) 5/4 *Global Discourse* 556-573.

of Europe.<sup>16</sup> We do not here purport to offer a close technical analysis of international law. Nor do we assume a hegemonic capitalist trajectory in which a single, monolithic form of corporate personhood assumes hypostatisation. We read the thread of hegemony traceable in patterns of coloniality and neocoloniality in the global order as being a reflection of a complex convergence between multiple, heterogeneous forces and actors. Despite complexities, however, we do see a recognisable, familiar dynamic in the contrast between TNC privilege and the vulnerability of corporeally specific human beings driven against national borders. This contrast, we suggest, gains renewed critical salience in an age marked by the rapid proliferation of walls—and in the face of the increasing likelihood of climate change-driven displacements.<sup>17</sup>

We begin by tracing the nature of the contemporary neoliberal legal order and its colonial roots. We then examine the constructs of legal personhood and jurisdiction as techniques of privilege and predation, revealing their threads of continuity with fundamentally colonising capitalist impulses and assumptions. Finally, we suggest some modest future research directions.

## 2 THE INTERNATIONAL LEGAL ORDER: COLONIALITY AND NEOLIBERALISM

While the contemporary era is predominantly characterised by globalised and globalising forces and relations and by a profound and growing sense of an unevenly distributed Anthropocene predicament,<sup>18</sup> there is nothing new about globalisation. Abu-Lughod traces early globalisation back to the thirteenth century Mongol Empire,<sup>19</sup> while Twining locates globalising dynamics in the well-established transnational flow of people, goods and ideas from at least the sixteenth century onwards.<sup>20</sup> Nevertheless, contemporary globalisation marks a mutation and intensification of earlier transnational dynamics: the speed, density and content<sup>21</sup> of transnational flows is so marked that it represents a qualitative shift from earlier forms,<sup>22</sup> and is a highly complex assemblage of ‘economic, social, political, cultural, religious and legal dimensions’,<sup>23</sup> made up of a diverse set of processes, events and developments, some of which may be contradictory.<sup>24</sup> For all this complexity, however, the ‘collective impact of very heterogeneous actors, markets, capital flows, supranational organisations and so forth, each of which understands itself to be making decisions in its own interest on the basis of economic considerations’<sup>25</sup> produces a high degree of ideological homogenisation—especially in the policy

<sup>16</sup> D Chakrabarty, *Provincialising Europe* (Princeton: Princeton University Press, 2007).

<sup>17</sup> See S Chaturvedi and T Doyle, ‘Geopolitics of fear and the emergence of “climate refugees”: imaginative geographies of climate change and displacements in Bangladesh’ (2010) 6/2 *Journal of the Indian Ocean Region*, 206-222 for a discussion of this that highlights the construction of a geopolitics of fear and ‘boundary-reinforcing cartographic anxieties about climate change-induced displacements and migrations’ (abstract).

<sup>18</sup> Malm and Hornborg argue that the Anthropocene is marked by ‘differentiated vulnerability on all scales of human society’ and that ‘[f]or the foreseeable future – indeed, as long as there are human societies on Earth – there will be lifeboats for the rich and privileged. If climate change represents a form of apocalypse, it is not universal, but uneven and combined: the species is as much an abstraction at the end of the line as at the source’: (n 4) at 63.

<sup>19</sup> See J Abu-Lughod, *Before the European Hegemony: The World System AD1250-1350* (New York: Oxford University Press, 1989).

<sup>20</sup> W Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) at 7.

<sup>21</sup> Contemporary globalisation has been described as a ‘rush of products, ideas, persons and money [stimulated by] jet transportation, electronic telecommunication, massive decolonization and extensive computerization’: TW Luke, ‘New World Order or Neo-World Orders: Power, Politics and Ideology in Informationalizing Globalities’ (1995) 91 *Global Modernities* at 99-100, cited by R McCorquodale and R Fairbrother, ‘Globalization and Human Rights’ (1999) 21 *Human Rights Quarterly* 735-766 at 738.

<sup>22</sup> B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002) at 165. De Sousa Santos refers to a range of commentators committed to such a view: M Featherstone (ed), *Global Culture: Nationalism, Globalization and Modernity* (London: Sage, 1990); A Giddens, *Sociology* (Oxford: Polity Press, 1990); M Albrow and E King (eds.) *Globalization, Knowledge and Society* (London: Sage, 1990).

<sup>23</sup> De Sousa Santos (n 22) at 166.

<sup>24</sup> U Baxi, *The Future of Human Rights* (Oxford: OUP, 2006) at 235.

<sup>25</sup> U Beck, *Power in the Global Age* (Cambridge: Polity Press, 2005/2006) at 117.



choices of governments.<sup>26</sup>

Such homogenisation has been particularly marked since the collapse of the Soviet Union in the late 1980s. Market-driven ideology has extended liberal capitalism into a system of global reach favouring a uniquely privileged dominant agent—the TNC.<sup>27</sup> TNC dominance is so marked that some scholars identify it as globalisation's defining characteristic.<sup>28</sup> Indeed, some scholars now identify the existence of a *de facto* global constitution for corporate capital<sup>29</sup> in the form of a 'new (global) constitutionalism'.<sup>30</sup> This is an order of power in which nation-states are assessed as 'good' or 'bad' on the basis of whether or not they are favourable 'host states for global capital'—an assessment reflecting the ascendancy of a virulent market 'morality' that has overwhelmed older notions and measures of state responsibility and conduct.<sup>31</sup> Moreover, as Baxi points out, the much-discussed 'end of the nation-state' thematic in discussions of globalisation really only means the end of the '*re-distributive state*', marking 'in some important ways ... the end of the processes and regimes of *human rights-oriented, redistributionist governance practices*'.<sup>32</sup> This is a situation in which 'the state becomes a point, perhaps, not even a nodal one, in the network of intensified international economic relations in a "borderless world"' for global capital.<sup>33</sup> The 'new' global constitutionalism—and its 'borderless world for global capital'—is legible, however, as the culmination of a pre-existing logic. It is possible to read neoliberal globalisation as a fundamentally neo-colonial enterprise by exposing complex but visible trajectories of continuity with earlier periods of primitive capital accumulation, colonialism and imperialism—linked by critical scholars to the genesis of the Anthropocene.<sup>34</sup> This is the particular thread of continuity that we will bring into our consideration of the role of personhood and jurisdiction. We therefore introduce that thread first.

## 2a Coloniality: The Story of Capitalist Imperialism

Neoliberal corporate globalisation is, in a central sense, a Eurocentric matrix of power with its roots in the history of European colonialism<sup>35</sup> enabled and legitimised by (early) international law doctrines and structures, the pillage and destruction of other cultures and the advancement of appropriative European culture and power<sup>36</sup>—and linked by some scholarly and scientific

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<sup>26</sup> T Evans and AJ Ayers, 'In the Service of Power: The Global Political Economy of Citizenship and Human Rights' (2006) 10 *Citizenship Studies* 239-308, at 293.

<sup>27</sup> More than one third of the world's industrial output was produced by TNCs in as early as 1995, and although 'the organizational novelty of the TNCs may be questioned from a world system perspective, it seems undeniable that their prevalence in the world economy, and the degree and efficacy of centralized direction they manage to achieve, manage to distinguish them from older forms of international business enterprise': De Sousa Santos (n 22) at 168. Beck characterises contemporary globalisation as 'one of the most important changes there has been in the history of power' (Beck (n 29) at 52) and TNCs as 'private sector *quasi-states*' (ibid, at 75).

<sup>28</sup> R Shamir, 'Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony' in B de Sousa Santos and CA Rodrigues-Garavito, *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 92-117 at 92.

<sup>29</sup> S Gill 'Globalisation, Market Civilisation, and Disciplinary Neoliberalism' (1995) 24 *Millennium Journal of International Studies*, 399- 423; D Schneiderman, 'Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism' (2000) 63 *Law and Contemporary Problems* 83-109; S. Gill, 'Constitutionalizing Inequality and the Clash of Globalizations' (2002) 4 *International Studies Review* 47- 65.

<sup>30</sup> See the various contributions in S Gill and AC Cutler (eds.), *New Constitutionalism and World Order* (Cambridge: CUP, 2014). In earlier work, Gill argues that the new constitutionalism is the '*political/judicial* form specific to neoliberal processes of accumulation and to market civilization': Gill, 'Constitutionalizing Inequality' (n 29) at 48.

<sup>31</sup> Baxi (n 24) 248-9.

<sup>32</sup> Ibid, 248. Emphasis original.

<sup>33</sup> Ibid, 246.

<sup>34</sup> Malm and Hornborg (n 4); Lewis and Maslin (n 5).

<sup>35</sup> A Quijano, 'Coloniality and Modernity/Rationality' in W Mignolo and A Escobar (eds.) *Globalization and the Decolonial Option*, (London and New York: Routledge, 2010) 22-32; A Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 *Cultural Studies* 168-178.

<sup>36</sup> A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005).

accounts to colonial antecedents of the Anthropocene.<sup>37</sup>

The discovery of the Americas, and their conquest by the Spanish and Portuguese monarchies, signalled the demise of the pre-existing ‘polycentric’ world of ‘several coexisting civilizations’.<sup>38</sup> The discovery of America by Columbus opened the gates through which Europe entered the world economy as a decisive force. America’s gold and silver enabled the expansion of the Spanish Empire, while the establishment, a century later, of a transatlantic trade in commodities brought a new affluence to the Netherlands and England through banking, finance and shipping and established the foundations of early mercantile capitalism.<sup>39</sup> The early TNC was key to such developments<sup>40</sup> and our selective genealogical account of transnational privilege begins with the early mercantile corporations. Indeed, McLean argues that ‘the history of colonial expansion is [also] a history of the corporate form’<sup>41</sup>—a point with considerable significance for understanding the unevenness of the present international order.

Chakrabarty has argued that the entire phenomenon of ‘political modernity’, namely the rule by modern institutions of the state, bureaucracy, and capitalist enterprise—is impossible to think of *anywhere in the world* without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological traditions of Europe.<sup>42</sup> The obliteration of pre-existing diversity was an impulse expressing a fundamentally hegemonic European ambition with violent hierarchical implications.<sup>43</sup> A variety of mystifications enabled European mastery: gender, race, time, subjectivity and Christianity converged into the matrix of power described by Quijano as ‘coloniality’.<sup>44</sup> In this process, which was—again—largely a process of state-corporate colonisation,<sup>45</sup> the homogenising changes imposed by Europeans resulted in a wave of material and semiotic disposessions:

The dispossessed frequently faced poverty and starvation, and the original accommodated relations between environment, humans and animals were fractured, sometimes beyond repair. European hegemony replaced such broken communities with hierarchical interventions, ontologies and European epistemologies imposed or imbibed through colonial institutions.<sup>46</sup>

European epistemological imperialism took control of ‘the writing of history’ and of ‘time’, which became linear, notionally objective,<sup>47</sup> suppressing other temporalities and the

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<sup>37</sup> Lewis and Maslin (n 5).

<sup>38</sup> W Mignolo, *The Darker Side of Western Modernity. Global Futures, Decolonial Options* (Duke Press, 2011), at 3. Mignolo argues that ‘[a]fter 1500 the world order entered into a process in which polycentrism began to be displaced by an emerging monocentric civilization (e.g., Western civilization)’ (at 28).

<sup>39</sup> Anghie (n 36).

<sup>40</sup> J McLean, ‘The Transnational Corporation in History: Lessons for Today?’ (2004) 79 *Indiana Law Journal* 363–377.

<sup>41</sup> *Ibid.*, at 364.

<sup>42</sup> Chakrabarty (n 16), 4.

<sup>43</sup> G Huggan and H Tiffin, ‘Green Postcolonialism’ (2007) 9(1) *Interventions: International Journal of Postcolonial Studies* 1–11.

<sup>44</sup> Quijano (n 35). This is a concept also central to the work of Mignolo: W Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization* (2nd edn.) (Ann Arbor: The University of Michigan Press, 2003).

<sup>45</sup> McLean (n 40). Koskeniemi argues that ‘[a] basic history of international law might treat the East India Company’s rule over most of the Indian peninsula from 1757 as an aberration—while it was merely the most conspicuous case of the basic forms of English and early French colonial expansion’: M Koskeniemi, ‘Expanding Histories of International Law’ (2016) 56 *American Journal of Legal History* 104–112 at 109.

<sup>46</sup> Huggan and Tiffin (n 43) at 2.

<sup>47</sup> G Nanni, *The Colonization of Time: Ritual, Routine and Resistance in the British Empire* (New York: Manchester University Press, 2012). Chakrabarty argues that the ideology of ‘progress’ in the nineteenth century ‘made modernity or capitalism look not simply global but rather . . . something that became global *over time*, by originating in one place (Europe) and then spreading outside it’, a construction of historical time itself taking on a “‘first in Europe, then elsewhere” structure’: Chakrabarty (n 16) at 7. For further discussion locating time as injustice against the production of the global, see A Grear, ‘Anthropocene “Time”? A reflection on temporalities in the ‘New Age of the Human’ in A Philippopoulos-Mihalopoulos (ed.), *Routledge Research Handbook on Law and Theory* (London: Routledge, 2019) 297–315.

multiple ‘stories’ expressing different world conceptions and histories.<sup>48</sup> Over time, European ‘modernity’ converged with colonialism in a totalising matrix of power controlling economy, knowledge and subjectivity,<sup>49</sup> and from the 19<sup>th</sup> century onwards shaped the industrialised capitalist foundations of the present fossil fuel economy<sup>50</sup> and the intensification of the trajectory towards the Anthropocene horizon.<sup>51</sup> Indeed, it was the opportunities provided by colonialism—the chance to accumulate land and raw materials to feed the Industrial Revolution unfolding in 19<sup>th</sup> century Britain in particular, that provided the ‘rationale for investing in steam technology’,<sup>52</sup> a technology key to the spread of colonialism itself<sup>53</sup>—and famously linked by Crutzen to the inauguration of the Anthropocene epoch.<sup>54</sup> As Malm and Hornborg point out,

... a clique of white British men literally pointed steam-power as a weapon — on sea and land, boats and rails — against the best part of humankind, from the Niger delta to the Yangzi delta, the Levant to Latin America. Capitalists in a small corner of the Western world invested in steam, laying the foundation stone for the fossil economy.<sup>55</sup>

As Anghie has argued, it was precisely this combination of colonial suppression and the competition between Northern states for natural resources that laid the foundations of the contemporary international legal order<sup>56</sup> in appropriative impulses re-enacting earlier colonising dynamics and extending the underlying ideology of Eurocentric mastery.

Law was central to such trajectories, defining the ‘subject’ through personhood and law’s reach through jurisdiction. The legal constructs legitimating Eurocentric power were initially embedded in the premises of ‘natural law’ and of Christianity. Vitoria,<sup>57</sup> Suarez and the philosophers of the Spanish School of Salamanca found in natural law the expression of God’s will and thus constructed a ‘justification’ for the imposition of the European systems of dominium, private property, serfdom and mercantilism so alien to aboriginal social and communal tenure systems.<sup>58</sup> Eurocentric intellectual and theological categories and concepts decisively shaped the juridical history of coloniality.<sup>59</sup>

Yet, while the Spanish colonies established a complex form of serfdom attached to the land in a quasi-feudal system, the English colonies were administered by a corporate structure driven by the pursuit of profit from as early as the sixteenth century.<sup>60</sup> Mercantilism was thus

<sup>48</sup> Mignolo (n 38) at 156.

<sup>49</sup> A Quijano and M Ennis, ‘Views from the South’ (2000) 1/1 *Nepanta* 533-580.

<sup>50</sup> This is an explicit theme in Anghie (n 36).

<sup>51</sup> PJ Crutzen, ‘Geology of Mankind’ (2002) 23 *Nature* 415.

<sup>52</sup> Malm and A Hornborg (n 4) at 63-64.

<sup>53</sup> Bell argues that such technologies were pivotal in the extension of imperial political structures: ‘ultimately it was a cluster of later technological innovations that provided the catalyst for the transformation in political consciousness: some of the most spectacular engineering triumphs of the Victorians, most notably the ocean-traversing steamship and especially the submarine telegraph, precipitated a fundamental restructuring of imperial political thought’: D Bell, ‘Dissolving Distance: Technology, Space and Empire in British Political Thought 1770-1900’ (2005) 77 *The Journal of Modern History* 523-562, at 526. Moreover, ‘[t]echnological change was not important simply because it helped to meet imperial “goals” but because it reshaped the very identity and direction of the goals themselves’ (at 529).

<sup>54</sup> Crutzen (n 51),

<sup>55</sup> Malm and Hornborg, (n 4) at 64.

<sup>56</sup> Anghie (n 36) at 211. This is the central theme in E Blanco and J Razzaque, *Globalisation and Natural Resources Law* (Cheltenham and Northampton: Edward Elgar, 2011). See, especially, 33-54.

<sup>57</sup> A Anghie, ‘Francisco De Vitoria and the Colonial Origins of International Law’ (1996) 5/3 *Social and Legal Studies* 321-336.

<sup>58</sup> See, for various accounts of such processes, M Koskenniemi, W Rech and J Fonseca (eds.) *International Law and Empire: Historical Explorations* (Oxford: OUP, 2017). For the Spanish contribution in particular, see M Koskenniemi, ‘Empire and International Law: the Real Spanish Contribution’ (2011) 61/1 *University of Toronto Law Journal* 1-36.

<sup>59</sup> Chakrabarty (n 16); Mignolo (n 38).

<sup>60</sup> M Koskenniemi, ‘Sovereignty, Property and Empire: Early Modern English Contexts’ (2017) 18 *Theoretical Inquiries in Law* 355-389. McLean (n 40) argues that the question of ‘whether or not collectivities have enjoyed distinct legal

embedded in, and dominated, the English colonial territories from their very early phases—with the corporation playing a central role in the acquisition of state and private power. McLean demonstrates how corporations first became ‘for profit’ trading entities in the sixteenth century.<sup>61</sup> Tellingly, she notes that in ‘the first two decades of the seventeenth century, some forty companies were granted trading monopolies by their respective governments over much of the known world’.<sup>62</sup> These monopoly powers covered trade and rights over national citizens abroad, and were an important source of national revenue as well as powerful corporate expressions of imperial and colonial ambition. The origin of international law is thus closely connected to Eurocentric Christendom, and to Eurocentric trade, mercantilism, capitalism, corporate power and resource extraction, all of which were facilitated by law’s calculative imperial design and philosophical underpinnings.

The fundamentally racist assumptions of Eurocentric intellectual and theological traditions were key to these developments. Race was used to decide and to define who could own property and who had to work on the land, and racialisation was used to circumscribe identities of the ‘other’, the alien, the stranger, and to legitimate the racist domination and classification of humans according to presumed markers of European rationality.<sup>63</sup> In the nineteenth century, a systematic racialised agenda took hold in the same broad timeframe within which the capitalist corporation broke away from the state to emerge as a fully independent juridical personality.<sup>64</sup> Colonisation through trade continued to express the racist logic of colonialism by other means in a period that also saw the crystallisation of the public-private divide.<sup>65</sup> This divide, as is well known, is central to the liberal legal mythos that enabled European corporations to take advantage of a legal framework that falsely reduced the power relations between corporations and the racialised indigenous inhabitants of colonised lands to an exchange between individuals. Such patterns are central, indeed, to what Woods describes as ‘imperial capitalism’<sup>66</sup> or what Banerjee, addressing the continuities between colonialism and neoliberalism, names ‘necrocapitalism’.<sup>67</sup>

The distributions of life and death operationalised by these continuities are central to the neoliberal order: Banerjee points out that the ‘practices of organizational accumulation’ that represent ‘necrocapitalism’<sup>68</sup> emerge from the intersection of necropolitics and necroeconomics in forms of accumulation by specific economic actors in (‘post’)colonial contexts—transnational corporations being the paradigmatic example—that involve dispossession, death, torture, suicide,

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identity has been crucial’ (at 364) to the history of colonial expansion and to its related questions of power. McLean traces corporate origins to the will of European monarchs. McLean demonstrates how corporations first became ‘for profit’ trading entities in the sixteenth century (at 365). Tellingly, she notes that in ‘the first two decades of the seventeenth century, some forty companies were granted trading monopolies by their respective governments over much of the known world’ (ibid). These monopoly powers covered trade and rights over national citizens abroad, and were an important source of national revenue as well as powerful corporate expressions of imperial and colonial ambition, McLean (n 40) at 365.

<sup>61</sup> McLean, ibid, 365.

<sup>62</sup> Ibid.

<sup>63</sup> See the discussion of the history and construction of slavery and race in S Martinot, *The Rule of Racialization: Class, Identity, Governance* (Philadelphia: Temple University Press, 2003).

<sup>64</sup> C Federman, ‘Constructing Kinds of Persons in 1886: Corporate and Criminal’ (2003) 14 *Law and Critique* 167-189. Federman’s research exposes the 19th-century corporation as ‘the new American man, the bodily expression of male power’, at 181, and it is abundantly clear from his analysis that this expression was also exclusively white.

<sup>65</sup> McLean (n 40) 370-1.

<sup>66</sup> EM Wood, *Empire of Capital* (London: Verso, 2005).

<sup>67</sup> Banerjee addresses capitalist ‘practices of organizational accumulation that involve violence, dispossession, and death’, linking them in a historical trajectory between colonial encounters and contemporary neoliberalism: SB Banerjee, ‘Necrocapitalism’ (2008) 29/12 *Organization Studies* 1541-1563 at 1543. Banerjee explicitly bases ‘necrocapitalism’ on Mbembe’s ‘necropolitics’: A Mbembe, ‘Necropolitics’ (2003) 15/1 *Public Culture* 11-40, necropolitics being ‘contemporary forms of subjugation of life to the power of death’: Mbembe, at 39, cited by Banerjee, at 1542.

<sup>68</sup> Banerjee, ibid, at 1543.



slavery, destruction of livelihoods, and the general management of violence. This is a newer form of imperialism, an imperialism that has learned to ‘manage things better’.<sup>69</sup>

## 2b Neoliberalism

A necrocapitalist analysis draws out neoliberalism’s complex perpetuation of coloniality, in the light of which neoliberalism itself emerges as an imperialistic project exercising power through juridical structures originally designed to facilitate European and then Western capitalistic dominance.<sup>70</sup>

The central project of neoliberalism has always been to ‘disembed capital’<sup>71</sup> from ‘a web of social and political constraints and a regulatory environment that sometimes restrained but in other instances led the way in economic and industrial strategy’.<sup>72</sup> Disembedding capital has driven forward a global policy of liberating market forces and corporations in a wave of privatisation, deregulation and through the selective hollowing out of the state.<sup>73</sup> At the ballot box, early neoliberalism appealed to voters in large part because it successfully drew on the rhetoric of individual freedom and dignity,<sup>74</sup> and neoliberalism, operationalised through the double-edged strategy of austerity and competition, has expanded worldwide under the guise of rational fiscal control and market driven reforms in significant part by calling on the name and cause of democracy and human rights.<sup>75</sup> It is only belatedly that international organisations such as the International Monetary Fund (IMF) and the World Bank have acknowledged neoliberalism’s fallouts in terms of increasing levels of inequality, but sadly this concern responds primarily to the effects of inequality on economic growth.<sup>76</sup> Meanwhile, unfettered market openness, in combination with the ravages of neoliberal austerity doctrine—essentially a state-facilitated method for socialising the debt generated by risky banking sector behaviour<sup>77</sup>—has

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<sup>69</sup> Ibid, 1548.

<sup>70</sup> Ibid; Anghie (n 36). The complexities of the trajectories involved in this are penetratingly discussed in S Marks, ‘Empire’s Law’ (2003) 10 *Indiana Journal of Global Legal Studies* 449-466. Marks analyses Hardt and Negri’s conception of ‘Empire’, which presents the relation between earlier imperialisms and contemporary global power as one characterized by deterritorialisation and reterritorialisation, unevenness and the persistence of familiar patterns of othering: ‘With deterritorialization comes reterritorialization, in the sense that old dichotomies shape the operations of the new more complex systems of domination. That is to say, they mediate those systems, reflecting the uneven geography that is one of globalization’s most widely remarked features. Indeed, Hardt and Negri observe that “the geographical and racial lines of oppression and exploitation that were established during the era of colonialism and imperialism have in many respects not declined but instead increased exponentially”’: Marks at 464, citing M Hardt and A Negri, *Empire* (Cambridge, Mass: Harvard University Press, 2000) at 43.

<sup>71</sup> D Harvey, *A Brief History of Neoliberalism* (Oxford: OUP, 2005) at 11.

<sup>72</sup> Ibid; Importantly, this web of constraints shields capital and property rights from democratic contestation. As Slobodian has argued, neoliberalism was, in its origins, a search ‘for models of governance, at scales from the local to the global, that would best encase and protect the space of the world economy. Neoliberals described this as a campaign against “interventionism,” but it was clearly interventionist in its own right’: Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, Massachusetts: Harvard University Press, 2018) at 92. (With thanks to Julia Dehm for this point). L Elliot, ‘World Bank Recommends Fewer Regulations Protecting Workers’ (2018) *The Guardian*, 20<sup>th</sup> April.

<sup>73</sup> Baxi (n 24) at 248-9; H Brabazon (ed.), *Neoliberal Legalist: Understanding the Role of Law in the Neoliberal Project* (London: Taylor and Francis Ltd 2016).

<sup>74</sup> Harvey (n 71) at 5.

<sup>75</sup> Evans and Ayers (n 26). See also, Baxi (n 24) for an extensive discussion of ‘trade related market friendly’ human rights. The relationship between neoliberalism and human rights is, however, by no means monolithic or uncontested: S Moyn, ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’ (2014) 77 *Law and Contemporary Problems* 147-169.

<sup>76</sup> JD Ostry, P Loungani, and D Furceri, ‘Neoliberalism: Oversold’ (2016) 38 *Finance and Development* 38-41 at 40 (Available at: <http://www.imf.org/external/pubs/ft/fandd/2016/06/pdf/ostry.pdf> Last accessed 26 September 2017).

<sup>77</sup> Gill, ‘Globalisation’ (n 29), points to persistent state intervention to impose market discipline for the weak and protection for the strong. This takes the form of the socialisation of debt to bail out powerful financial interests have in both the global North and South by drawing on government tax funds and by cutting spending on social benefits such as health and education. The narrative of debt also acts to mask systemic inequality. See A

created the deepening income inequality and the increased precarity that now feeds a rejection of both globalisation and elite power.<sup>78</sup> Gill notes that ‘one of the principal costs of the neoliberal, market-monetarist austerity policies, is persistent mass unemployment. Concentrated heavily among younger and less skilled workers, it partly explains tough immigration and asylum policies and . . . contributes to a potent mixture of social and economic dislocation, physical risks, racism and xenophobia’.<sup>79</sup>

Neoliberalism imposes economic and political subjection precisely by recasting coloniality through the imposition of monetary policies, conditional loans and structural adjustment programmes operationalised by a sophisticated meshwork of laws governing property, contracts and foreign direct investment.<sup>80</sup> Questions of elite power—central to the unfolding of colonialism in earlier periods—were always central—and remain central—to neoliberalism. Harvey notes, in this regard, that ‘neoliberalization was from the very beginning a project to achieve the restoration of class power’.<sup>81</sup> Indeed, Harvey argues that the most compelling interpretation of neoliberalism is as a ‘political project to re-establish the conditions for capital accumulation and to restore the power of economic elites’.<sup>82</sup> Neoliberalism thus aims at managing and legitimating inequality, not at addressing it.<sup>83</sup> Indeed, despite its apparently economic roots and the centrality of the market to its ideology, neoliberalism has intensified legal and regulatory controls in the service of extending economistic logics through all social spheres and is legible as a normative project concerning the nature of freedom and democracy, for which law is central.<sup>84</sup> Neoliberalism is, in other words, an inherently juridical project and the mythic function of law under neoliberalism is relatively consistent with earlier liberal capitalist conceptions of law, with claims of neutrality, equality and formal rationality remaining ideologically central.<sup>85</sup> Under neoliberalism, these normative claims are *more* destructively instrumentalised than in previous regulatory projects, deployed in order to legitimate stultifying levels of state control in the service of extensive neoliberal appropriation. Dardot and Laval, for example, argue that the deepening regulatory control of life under neoliberalism is a key characteristic of a ‘totalising rationality . . . destructive of the welfare state apparatus’<sup>86</sup> that had briefly interrupted elite accumulation of profit during the post-war period. Brabazon has argued that

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Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995).

<sup>78</sup> Gill notes that ‘one of the principal costs of the neoliberal, market-monetarist austerity policies, is persistent mass unemployment. Concentrated heavily among younger and less skilled workers, it partly explains tough immigration and asylum policies and . . . contributes to a potent mixture of social and economic dislocation, physical risks, racism and xenophobia’: S Gill, ‘European governance and new constitutionalism: Economic and Monetary Union and alternatives to disciplinary Neoliberalism in Europe’ (1998) 3/1 *New Political Economy* 5-26 at 6.

<sup>79</sup> Ibid.

<sup>80</sup> Beck (n 29) at 123 notes that countries in the Global South are forced to submit to neoliberal strictures by the World Bank and Western funding bodies, while Richardson notes that structural adjustments such as deregulation, privatisation and the removal of protective policies are most aggressively forced on the poorest and most marginalised societies: JL Richardson, ‘Contending Liberalisms: Past and Present’ (1997) 3 *European Journal of International Relations* 5-33 at 21; ‘The IMF and the World Bank: Puppets of the Neoliberal Onslaught’ (2000) 31/2 *The Thistle*, (available at <http://www.mit.edu/~thistle/v13/2/imf.html> Date of Last Access: 25<sup>th</sup> April 2018); See also, S Pahuja, ‘Technologies of Empire: IMF Conditionality and the Re-Inscription of the North-South Divide’ (2000) 13 *Leiden Journal of International Law* 749-813.

<sup>81</sup> Harvey (n 71) at 16. Harvey here draws upon the careful reconstruction of the data undertaken by Gerard Dumenil and Dominique Levy.

<sup>82</sup> Harvey (n 71) at 19.

<sup>83</sup> Brabazon (n 73) at 2.

<sup>84</sup> AC Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press 2003), especially at 16-59.

<sup>85</sup> K Klare, ‘Law Making as Praxis’ (1979) 40 *Telos* 123-135; Brabazon (n 73) at 2.

<sup>86</sup> P Dardot and C Laval, *The New Way Of The World: On Neoliberal Society* (New York: Verso, 2013) at 33.

neoliberalism as an ideological and theoretical project can be seen as the creation of a particular kind of society and subjectivity rooted in a very limited conception of individuality, democracy, and social life, in which public debate and dissent are minimal and contained, collective action discouraged, and substantive inequalities are ignored or celebrated as convenient.<sup>87</sup>

The state's role in this process is complex: the state is 'restructured . . . rather than restrained',<sup>88</sup> and reoriented towards facilitating and protecting market transactions, away from social concerns.<sup>89</sup> 'Particular subjects and social relations'<sup>90</sup> emerge from this process, entrenching coloniality in new, arguably more complex, forms.<sup>91</sup> Neoliberal globalisation can thus be viewed as a non-monolithic,<sup>92</sup> hegemonic ideological project inseparably bound to the earlier European colonial project and co-productive in the rising precarity and multiple crises of the Anthropocene.<sup>93</sup>

As we will argue in the next two sections, personhood and jurisdiction played important roles in the evolution of coloniality and remain influential conduits for the expression and further accumulation of power in the neoliberal global order—as well as continuing to present complex challenges in the Anthropocene.

### 3 LEGAL PERSONHOOD: PATTERNS OF PRIVILEGE AND MARGINALISATION

This section of our argument will position legal personhood as a construct that, despite its putative neutrality, forms a conduit for the continuing influence of a Eurocentric rationalistic trope of 'man' that brings corporate juridical privilege and the privation and vulnerability of corporeally specific human 'outsiders' or 'others' into direct and problematic relations of injustice. Core to this analysis is a patterned politics of disembodiment central to the operation of TNCs as cloaking devices for the accumulation of elite capitalist power.

Before beginning our critical account of legal personhood as a technique of dominance, it is important to note that posthuman developments and the pressures of ecological breakdown make it increasingly necessary to imagine potential new recipients of legal personhood and/or rights of standing.<sup>94</sup> Indeed, such arguments are already passionately made by a range of advocates, scholars and activists, and novel approaches, such as the granting of legal personhood

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<sup>87</sup> Brabazon (n 73) at 12.

<sup>88</sup> Ibid, at 5.

<sup>89</sup> P Mirowski, 'The Political Movement that Dared not Speak its own Name: The Neoliberal Thought Collective Under Erasure' (2014) Working Paper n 23, Institute for New Economic Thinking (available at <http://cms.ineteconomics.org/uploads/papers/WP23-Mirowski.pdf> Date of Last Access: 25<sup>th</sup> April 2018).

<sup>90</sup> Dardot and Laval (n 86) at 3.

<sup>91</sup> The reality is thus a far cry from economic presentations of neoliberalism as the solution to political and economic problems and the source of individual liberty, as presented by FA Hayek, *Road to Serfdom* (London: Routledge, 1944) and by M Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press 1962).

<sup>92</sup> While it is clear that neoliberalism has hegemonic ambition and implications, it is important to remember that neoliberalism is also multiple and contradictory. For an analysis, see J Newman, 'Landscapes of antagonism: Local governance, neoliberalism and austerity' (2014) 51/15 *Urban Studies* 3290-3305. As noted above, it is in part the very heterogeneity of neoliberal actors and dynamics that co-produce the degree of ideological hegemony operating to restrain choice as the policy level.

<sup>93</sup> Lewis and Maslin (n 5). See also SL Lewis and MA Maslin, *The Human Planet: How We Created the Anthropocene* (London: Penguin/Random House, 2018); WE Connolly and BJ Macdonald, 'Confronting the Anthropocene and Contesting Neoliberalism: An Interview with William E. Connolly', (2015) 37/2 *New Political Science* 259-275.

<sup>94</sup> See, for example, LB Solum, 'Legal Personhood for Artificial Intelligences' (1992) 70 *North Carolina Law Review* 1231; G Teubner, 'Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law' (2006) 33 *Journal of Law and Society* 497. An extensive literature concerning the implications of a range of developments for legal and human rights circles around related questions: For examples, see P Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press, 2001); CR Sunstein and MC Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004).

to rivers, animals and other non-human natural systems and entities,<sup>95</sup> already exist. However, despite such developments, and despite the undoubted potential of legal personhood for imaginative, future-facing deployments,<sup>96</sup> it remains essential not to underestimate the traction of Eurocentric, rationalistic assumptions underwriting law and legal personhood. Even when new forms of legal person are generated, there is nothing to guarantee immunity from the continuing ideological traction of law's well-rehearsed patterns of privilege and predation. It is perfectly possible to foresee a world populated by myriad forms of legal persons/entities, in which familiar and long-standing patterns of marginalisation and predation *persist*. Even 'rights and personhood for nature', an increasingly popular approach, can continue to operate forms of coloniality by universalising 'colonial modes of existence as natural', as Rawson and Mansfield have argued that they do.<sup>97</sup> In short, legal personhood is long central to law's tilted distribution of power and privilege, marginalisation and dispossession—and it remains vital to retain critical suspicion, perhaps *especially* when calling on it for new, imaginative juridical projects.

We have already briefly noted the importance of the legal form of the corporation in colonial distributions of power, but we now turn to introduce in a little more depth the role and ideological structure of the form of law's persons—including law's 'human' persons—in the dynamics of privilege and predation at issue in the neoliberal global order.

### 3a 'Persons', property and exclusion

The construct of the 'person' has always performed a political function, and has been deployed in Eurocentric philosophy, ethics and law to denote beings or entities considered worthy of moral and/or legal concern, to the (admittedly complex) exclusion of others. While structurally, 'law's person' is analytically co-constitutive with the attribution of legal rights,<sup>98</sup> rights—including rights as politico-moral claims—have always historically tended to privilege propertied elites<sup>99</sup>—a fact underlining the importance of retaining a certain wariness when brandishing the meta-ethical appeal of claims to rights and personhood.

The long history of struggles for legal recognition by marginalised human groups reveals the degree to which rights and personhood were always reluctantly and incompletely conceded.<sup>100</sup> A wide range of critical scholarship exposes the fact that the gradual historical expansion of the

<sup>95</sup> Famously, for example, the Whangai River and the Te Urewera (a former National Park) in New Zealand have been granted legal personality: See CJ Iorns Magellanes, "Nature as an Ancestor": Two Examples of Legal Personality for Nature in New Zealand' (2015) *Vertigo* (available at: <https://journals.openedition.org/vertigo/16199>) Date of last access, 19<sup>th</sup> November 2018. Iorns Magellanes notes, rightly, however, that 'these changes have been agreed to for human rights reasons, not for environmental protection reasons'.

<sup>96</sup> For a fascinating discussion, see E Mussawir and C Parsley, 'The law of persons today: at the margins of jurisprudence' (2017) 11/1 *Law and Humanities* 44-63.

<sup>97</sup> A Rawson and B Mansfield, 'Producing juridical knowledge: "Rights of Nature" or the naturalization of rights?' (2018) 1 *Nature and Space* 99-119.

<sup>98</sup> The legal person and legal rights presuppose one another in an analytical sense: "The subject is a creation of the law, an artificial entity which serves as the logical support of legal relations. Right and subject come into life together": (C Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000) at 233) though the substance of the relationship varies, not least in line with differing theoretical accounts of rights and legal personhood. See, for example: A Nekam, *The Personality Conception of the Legal Entity* (Boston: Harvard University Press, 1938); A Peacocke and G Gillet, *Persons and Personality: A Contemporary Inquiry* (Oxford: Blackwell, 1987); DP Derham, 'Theories of Legal Personality' in LC Webb (ed.) *Legal Personality and Political Pluralism* (New York: Cambridge University Press, 1958); N Naffine, 'The Nature of Legal Personality', in M Davies and N Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Aldershot: Ashgate, 2001).

<sup>99</sup> See, for example, the detailed historical account offered by M Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004). See also N Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 *Human Rights Quarterly* 980-1008.

<sup>100</sup> Ishay, *ibid*; Stammers, *ibid*. As Stone has noted, rights were originally attributed to only a very narrow class of human beings, rarely to 'others' beyond family or tribal kinship networks, and seldom to women and children: C Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (2012) 0 *Journal of Human Rights and the Environment* Special Issue: 'Should Trees Have Standing: 40 Years On?' S4-S55 at S4, citing Charles Darwin, *The Descent of Man* (2<sup>nd</sup> edn, 1874) at 113-4.

legal categories of rights-bearers carries with it an entirely predictable set of marginalisations.<sup>101</sup> And while contemporary marginalised human subjects (women, children, indigenous people, refugees, climate migrants etc.) stand in more complex relation to law's inclusion, neither the universal human of human rights, nor the legal person, have ever cast off a centripetal tendency towards an intrinsically Eurocentric construct prioritising the putatively rational, property owning, white male. Such a centripetal tendency is evident in the fact that all 'others' to this trope—including indigenous peoples—and 'nature' itself—are complexly objectified, and feminised,<sup>102</sup> and cannot form central case instances of the human legal person.<sup>103</sup>

These archetypal conceptual patterns and their material expressions of power are also firmly embedded in constructs of international legal personhood.<sup>104</sup> Koskenniemi argues that 'the international doctrine of State sovereignty bears an obvious resemblance to the domestic-liberal doctrine of individual liberty',<sup>105</sup> while Nijman argues that the 'individual and the collective (e.g. the state) Self are (philosophically) intertwined [and that t]his is self-evident as the individualist, subjectivist perspective has marked the deep structure of international law'—including, of course, the structure of international legal personhood.<sup>106</sup> The state is, in many senses, the individual writ large—a continuity that comes as no surprise, notwithstanding the importance of rejecting a reductive equivalence between the sovereign state and the individual.<sup>107</sup> Despite complexities and distinctions, a range of scholarship makes clear the fact that the ultimate subject of all forms of law is the privileged, 'rational', white male template central to Eurocentric law, politics, economics and philosophy.<sup>108</sup>

This master-trope reflects a particular set of subject-object relations that undergird the boundary function of liberal law's two central ontological categories: persons and property. The binary contradiction between personhood and property is, however, rather more apparent than real. As Davies, Naffine and others have argued, law's person is in reality *constituted* by property-centred assumptions, and personhood fulfils an important ideological function in assuring the *prioritisation* of property and the interests of the propertied in liberal legal systems.<sup>109</sup>

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<sup>101</sup> There are various vigorous critiques of the stubborn exclusivity of the law's human person and of law's failure of true recognition for those humans who do not fit the template of the white, propertied European male. This exclusivity marks the entire history of human rights. See Ishay (n 100); J Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge Mass.: Harvard University Press, 1996); D Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law in D Buss and A Manji (eds.) *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005) 105-129; D Otto, 'Lost in Translation: Rescripting the Sexed Subjects of International Human Rights Law' in A Orford (ed.), *International Law and its Others* (Cambridge: Cambridge University Press, 2006).

<sup>102</sup> For an invigorating critical ecological feminist account of this, see V Plumwood, *Feminism and the Mastery of Nature* (London and New York: Routledge, 1993).

<sup>103</sup> Otto (n 101); N Naffine, 'Women and the Cast of Legal Persons' in J Jones, A Grear, RA Fenton and K Stevenson, *Gender, Sexualities and Law* (London: Routledge, 2011) 15-25.

<sup>104</sup> JE Nijman, 'Paul Ricoeur and International Law. Beyond "The End of the Subject": Towards a Reconceptualization of International Legal Personality' (2007) 20 *Leiden Journal of International Law* 25-64.

<sup>105</sup> M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue) (Cambridge: CUP, 2005) at 224.

<sup>106</sup> Nijman (n 104) at 26.

<sup>107</sup> K Knop, 'Re/statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293-344. Knop rightly makes the obvious point that 'States are not like individuals in the significant respect that they are not unified beings, they are not irreducible units of analysis' (at 320). There is, however, 'plenty of room for critique, for examining, in Kirsti McClure's words, "the complicity between the sovereign subject and the sovereign state in modern political theory": JB Elshtain, 'Sovereign God, Sovereign State, Sovereign Self' (1991) 66/5 *Notre Dame Law Review* 1355-1378 at 1375.

<sup>108</sup> P Halewood, 'Law's Bodies: Disembodiment and the Structure of Liberal Property Rights' (1996) 81 *Iowa Law Review* 1331-1393. The centrality of the masculine subject presents pervasive challenges for non-male others in all fields of law—even human rights. See, for example, F Beveridge and S Mullally, 'International Human Rights and Body Politics' in J Bridgeman and S Millns (eds.) *Law and Body Politics: Regulating the Female Body* (Aldershot: Dartmouth, 1995).

<sup>109</sup> Davies and Naffine (n 98).

In short, a relentless ideological and structural priority is given to a Eurocentric conception of possessive individualism, and liberal law—including international law—constructs its archetypal persons—as individuals, states and/or corporations (corporations are more fully discussed below)—on this basis.<sup>110</sup> This explains why entities serving the interests of propertied elites present no difficulty as putative legal persons, unlike the marginalised human beings who can never represent paradigmatic instances of legal personhood: ‘[T]rusts, corporations, joint ventures, municipalities... and nation states’ have all been designated as rights-holders,<sup>111</sup> and it is notable that corporations and nation-states, as was just implied, have historically tended to be idealised—at an archetypal level—as idiosyncratic embodiments of the paradigmatic liberal legal actor.<sup>112</sup>

The relentless prioritisation of property and its owners central to such patterns is thoroughly visible in rights-based national constitutions in Europe and the US,<sup>113</sup> testament not only to the historical influence of propertied elites, but also directly continuous with the corporation-centred ‘new global constitutionalism’ of the neoliberal order.<sup>114</sup>

The construct of the legal person is thus legible as a property-centred assemblage that conditions multiple sites of capitalistic biopolitical governance. Legal personhood is a pivotal and mutable ideological tool for mediating exclusionary power relations. It is also key to privilege of corporations<sup>115</sup> and equally pivotal to the production of marginalised subjects intransigently marked as law’s ‘outsiders’.<sup>116</sup>

Against this background, and read against the long history of rights claims turning, in the process of institutionalisation, towards the re-inscription of the rights of men of property,<sup>117</sup> it is easy to see why business corporations have accrued a form of corporate legal humanity<sup>118</sup> through the accumulation of rights originally reserved for the elite humans in whose image and interests they were first formed.<sup>119</sup> The consequences of the ways in which legal personhood is constructed, while presented as a neutral legal concept, are incontrovertibly serious and too often overlooked<sup>120</sup> by a significant number of those pursuing novel approaches to legal rights and

<sup>110</sup> J Nedelsky, ‘Law, Boundaries and the Bounded Self’ (1990) 30 *Representations* 162-189.

<sup>111</sup> Stone (n 100) at S6.

<sup>112</sup> Federman (n 64).

<sup>113</sup> Ishay (n 100); L Hunt, *The French Revolution and Human Rights: A Brief Documentary History* (New York: Bedford/St Martins Press, 1996).

<sup>114</sup> Gill ‘Globalisation’ (n 29); Gill and Cutler (n 30).

<sup>115</sup> C Harding, U Kohl and N Salmon, *Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors* (Aldershot: Ashgate, 2008); A Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Basingstoke: Palgrave MacMillan, 2010). See also, MT Kamminga and S Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law International, 2000); SR Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443-545; P Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2001) 24 *Hastings International and Comparative Law Review* 297-320; CB Onwuekwue, ‘Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence: A Developing Country’s Nightmare’ (2006) 7(1) *Journal of World Investment and Trade* 115-141.

<sup>116</sup> Otto (n 101).

<sup>117</sup> Ishay (n 100); Stammers (n 102); Hunt (n 115).

<sup>118</sup> Harding, et al (n 115); A Grear (n 115).

<sup>119</sup> On the accumulation of rights, see Grear (n 115); Harding et al (n 120); GA Marks, ‘The Personification of the Business Corporation in American Law’ (1987) 54 *The University of Chicago Law Review* 1441-1483; CJ Mayer, ‘Personalising the Impersonal: Corporations and the Bill of Rights’ (1990) 41 *Hastings Law Journal* 577-663; M Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006). On the corporate form as the image of the masculinist, property-centred subject, see Federman (n 64); K Lahey and SW Salter, ‘Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism’ (1985) 23/4 *Osgood Hall Law Journal* 543-572: ‘the business corporation is a perfection of the masculinist vision of self—existence as property, separation of accountability and enjoyment, abstract rules as justice, domination as ownership’ (at 555). The ‘corporate legal form . . . perfects and depoliticizes domination . . .’ (ibid).

<sup>120</sup> J Berg, ‘Of Elephants and Embryos: A Proposed Framework for Legal Personhood’ (2007) 59 *Hastings Law Journal* 369-406. Berg notes that ‘[a]lthough many philosophers have struggled with the concept of moral personhood, legal personhood has largely been ignored outside of the corporate context’ (at 370).



personhood—an oversight that might prove increasingly in conditions of entrenched and deepening global unevenness.<sup>121</sup>

### 3b The form(s) of legal personhood

There are two major traditions in the jurisprudence of persons: one naturalistic, which draws closely upon heavily naturalised subtending notions of the human being, and the other positivistic, for which persons are generated by law as a technical fiat. For naturalistic accounts, legal personhood is a designation merely recognising a set of assumed human characteristics—most notably, the capacity for rational choice.<sup>122</sup> For positivist accounts, by contrast, the ‘person’ in law is merely a formal operational referent designating the meeting place of norms and their relations.<sup>123</sup> While it would be natural to assume that the corporation is straightforwardly an instance of a positivist construct of the legal person<sup>124</sup> and that law’s ‘natural persons’ are straightforwardly human, matters are more complex than that—and it is in these complexities that we find important clues to threads linking TNC privilege, Eurocentricity, coloniality and the pathological unevenness of the neoliberal global order.

All forms of personhood, even the most ‘natural’ are, in fact, a *constructus*.<sup>125</sup> The ‘natural person’ of law, precisely because it posits a human figure as its direct substrate, heavily *disguises* its constructed nature.<sup>126</sup> In contrast, positivist accounts are overt about the constructed nature of their person.<sup>127</sup> *Anything* ‘can be a legal person because legal persons are stipulated as such or are defined into existence’.<sup>128</sup> The explicitly manufactured, abstract or ‘empty’ person stands at one end of a spectrum, therefore, at the other end of which is the most exclusive of naturalistic conceptions, the archetypal rational liberal legal actor (‘the classic contractor’).<sup>129</sup> Significantly, however, even the most abstracted and ‘empty’ of conceptions of legal personhood is forced to ‘materialise’<sup>130</sup>—and when it does, it nearly always tends to do so as the archetypal rational liberal legal actor (the Eurocentric rationalistic legal man).<sup>131</sup> Even the human rights universal, the most putatively inclusive naturalistic template, relentlessly prioritises the same submerged Eurocentric trope of the subject.<sup>132</sup> In short, as Naffine concludes, legal personhood ‘fairly *systematically* helps to support a quite particular interpretation of the person, and one which has an intimate

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<sup>121</sup> A Grear, “‘Mind the Gap’: One Dilemma Concerning the Expansion of Legal Subjectivity in the Age of Globalisation” (2011) 1/1 *Law, Crime and History* 1-8.

<sup>122</sup> N Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66/3 *Modern Law Review* 346-367 at 362. The ‘natural person’ of law is without exception considered to be of human genetic origin: Berg (n 120) at 373.

<sup>123</sup> See, for example, Nekam (n 98).

<sup>124</sup> Naffine makes this assumption—an assumption that seems connected to the argument that ‘[a]nything can be a [positivist’s] legal entity’ (n 122) at 351.

<sup>125</sup> A Grear, ‘Law’s Entities: Complexity, Plasticity and Justice’ (2013) 4/1 *Jurisprudence* 76-101 at 84.

<sup>126</sup> *Ibid* at 88.

<sup>127</sup> Famously, for Kelsen, the ‘so-called physical person ... is not a human being, but the personified unity of the legal norms that obligate or authorise one and the same human being’: H Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967) 173-4. International legal personality is no exception, and despite reformulations, ‘within mainstream positive international law the established concept of personhood is indeed [Kelsen’s] formal description of “subject of rights and duties under international law”’: Nijman (n 104) at 32.

<sup>128</sup> Naffine (n 122) at 351.

<sup>129</sup> Naffine, *ibid*, at 362. Naffine identifies three templates of legal personhood in Naffine (n 122) but later, in N Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart Publishing, 2009) adds a fourth category.

<sup>130</sup> Naffine (n 122) 355. Even Nekam, who offers one of the ‘purest’ positivist accounts, is forced to acknowledge that ‘the legal entity’ is ‘always something in whose experimental existence the community believes’—this, despite the fact that the legal entity’s qualities are defined by law and that ‘all the other eventual qualities of the beneficiary [of rights] will be totally immaterial from [the law’s] point of view’: Nekam (n 98) at 40. Radin, meanwhile, notes that law is forced to ‘take into account the real concrete human being as a prolific source of [legal] relations’: M Radin, ‘The Endless Problem of Corporate Personality’ (1932) 32 *Columbia Law Review* 643-667, at 651.

<sup>131</sup> Naffine (n 122) at 356.

<sup>132</sup> See references above (n 101).

connection with its companion concept, property'.<sup>133</sup> Legal personhood, in other words, systematically privileges the elite, property-owning 'man' at the heart of the liberal political order, a construct constituted by the 'Reason' thought to justify the civilisational priority of European males over other humans, whether women, children, indigenous peoples, non-Europeans or non-property owners (including nomads).<sup>134</sup>

This submerged politics *matters* for thinking about legal personhood generally: all forms of legal personhood—including new and inventive forms—need to be critically evaluated for the degree to which they are drawn into the traction of this centripetal ideological construct.

### 3c Legal personhood and the politics of disembodiment

Key to the Eurocentric trope of the paradigmatic legal actor is its underlying, broadly Cartesian and Kantian disembodied ontology.<sup>135</sup> Rationalist, property-centred 'legal theory [has systematically underplayed] the mundane fact that in order for the law to function at all it must first and foremost have a hold over bodies'<sup>136</sup>—while *simultaneously* elevating a form of disembodied reason that detaches law's paradigmatic person from that very same embodiment.<sup>137</sup> A slippery politics is at work here. Some bodies remain fully vulnerable to the operation of law's ultimately coercive hold over corporeality even as other bodies are, at least at an archetypal level, selectively privileged by their simultaneous centrality *and* imputed disembodiment.<sup>138</sup> The imagined inferiority of the non-European, the non-male, the non-white, the non-property owner and other 'less than fully rational' others turns upon their degrees and kinds of corporeality, emotionality, animality and other forms of constructed unreason.<sup>139</sup> Kapur has observed in this connection that

the liberal project could reconcile promises of universality with exclusions in practice through a clear and persuasive logic. Rights and benefits were linked to the capacity to reason, and the capacity to reason was tied to notions of biological determinism, racial and religious superiority, and civilizational maturity.<sup>140</sup>

Critical legal theorists of various stripes (feminists, critical race scholars, TWAIL scholars, indigenous scholars and so forth) have stripped back the impossible disembodiment of

<sup>133</sup> N Naffine, 'The Nature of Legal Personality' in Davies and Naffine (n 98) at 56. Emphasis added.

<sup>134</sup> Well captured by Kapur's analysis of 'discriminatory universalism' and the role of 'Reason' in R Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 *Sydney Law Review* 665-687.

<sup>135</sup> Halewood (n 108).

<sup>136</sup> P Cheah, D Fraser and J Grbich (eds), *Thinking Through the Body of Law* (St Leonards: Allen and Unwin, 1996) at xv, cited by SD Sclater, 'Introduction' in A Bainham, SD Sclater, and M Richards, *Body Lore and Laws* (Oxford: Hart, 2002) at 1.

<sup>137</sup> Halewood (n 108), analysing liberal law's property-centred rationalism, points out that it is precisely the 'separation of subjects from objects ... shearing all distinguishing embodiment or particularity [and it is this ideological sleight of hand which] permits the formal equality of legal subjects': at 1340.

<sup>138</sup> The archetypal human 'body' of international law (including human rights law) is masculine, racially white and Eurocentric, but this body is 'smuggled' into a 'neutral' abstract universal, precisely in order to disguise its particularity and privilege. It is notable, moreover, that non-white, non-Europeans were feminised: 'The feminization of the Orient is one of the enduring themes in the scholarly study of colonialism. The colonial authorities represented the natives as passive, ignorant, irrational outwardly submissive but inwardly guileful, sexually unrestrained and emotionally demanding—not inherently female characteristics, perhaps, but defined as a trope in opposition to the self-mastery and openness that the hypermasculinized colonizing Westerners ascribed to themselves': TM Lurhmann, 'The good Parsi: The post-colonial feminization of a colonial elite' (1994) 29 *Man* 333-357, at 333.

<sup>139</sup> Kapur (n 134); M Dekha, 'Intersectionality and Post-Human Visions of Equality' (2008) 23 *Wisconsin Journal of Law, Gender and Society* 249-267. For more, see (as referenced by Dekha) S Salih, 'Filling Up the Space between Mankind and Ape: Racism, Speciesism and the Androphilic Ape' (2007) 38 *Ariel* 95-111.

<sup>140</sup> R Kapur, 'The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion' (2007) 8/2 *Theoretical Inquiries in Law* 537-570 at 541.

the rational actor to reveal its all-too-particular ‘smuggled’ body.<sup>141</sup> This body is unmistakably that of the white, European, male, heterosexual *paterfamilias*, the archetypal citizen of civilised liberalism whose sociality resides in contractual exchanges and whose autonomy is expressed in the possession of property.<sup>142</sup>

It is precisely such assumptions that co-situate marginalised humans, non-dominant humans, non-human animals and natural systems in ‘entanglements of oppression’ particularly destructive since the advent of corporate industrial capitalism<sup>143</sup>—and increasingly troubling in the age of the Anthropocene. The ontological and epistemological assumptions underpinning these assumptions remain powerful in the contemporary neoliberal global order, with its parallel hierarchical binary between the global North and South. Meanwhile, at national and international levels alike, ‘liberal legalism [deliberately occludes] both “the legal ordering of economic policy” and the inherently political nature of that legal ordering’<sup>144</sup> in order to evade troubling questions of structural injustice.

### 3d The TNC: The apotheosis of the liberal legal actor

The ideological assumptions underwriting the forms of law’s human persons play out as clear critical strands in relation to the ideological structure of the corporate form. First, there is a sense in which the corporation is the liberal Eurocentric trope of the rational actor writ large; secondly, there is a sense in which the legal disembodiment of the corporate body is precisely what enables it to evade core vulnerabilities attaching to corporeal human bodies.

It should be clear by now that our analysis links transnational corporate power to the privileges acquired by corporations from the 16<sup>th</sup> century onwards as carriers of European imperial ambition.<sup>145</sup> The specific advantages arising from the corporation’s legal form are powerful expressions of structural continuities between property, elite male power and European rationalism in the international legal order,<sup>146</sup> and the corporation’s degree of correspondence with the paradigmatic Eurocentric liberal legal actor is striking.<sup>147</sup> Analysing the twinned production of corporate and criminal persons in 19<sup>th</sup> century North America, Federman describes how the corporation ‘[took] shape not simply as a bearer of traditional English liberties, but as a corporate “person”, who is not dissimilar to the bearer of traditional English liberties, and yet is structurally different’.<sup>148</sup> The construction of corporations as private persons in law—a pivotal development in capitalist corporate theory—is a key source of their relative legal impunity in the global economy that they now so dominate. Their complex entanglements in the interests of capitalist states, moreover, further reduce their legal accountability. De Sousa Santos argues that it is precisely

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<sup>141</sup> As Ahmed has put it, ‘[t]he disembodiment of the masculine perspective is itself an inscription of a body, a body which is so comfortable we needn’t know it was there, a body which is simply a home for a mind, and doesn’t interrupt it, confuse it, deceive it with irrationalism, or bleeding, or pregnancy’: S Ahmed, ‘Deconstruction and Law’s Other: Towards a Feminist Theory of Embodied Legal Rights’ (1995) 4 *Social and Legal Studies* 55-73 at 56.

<sup>142</sup> K Green, ‘Citizens and Squatters: Under the Surfaces of Land Law’ in Bright, S, and Dewar, J, (eds) *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 229-256.

<sup>143</sup> D Nibert, *Animal Rights, Human Rights: Entanglements of Oppression and Liberation* (Lanham MD: Rowman and Littlefield, 2002)

<sup>144</sup> A Orford, ‘Food Security, Free Trade and the Battle for the State’ (2015) 11/2 *Journal of International Law and International Relations* 1-67, at 22.

<sup>145</sup> See McLean (n 40) and related discussions.

<sup>146</sup> Anghie (n 36); Marks (n 70). See also, for a detailed discussion of early TNCs, their form and the motivations driving their structural design, AM Carlos and S Nicholas, ‘Giants of an Earlier Capitalism: The Early Chartered Trading Companies as Modern Multinationals’ (1988) 62 *Business History Review* 398-419; SRH Jones and SP Ville, ‘Efficient Transactors or Rent-Seeking Monopolists? The Rationale for Early Chartered Trading Companies’ (1996) 56/4 *The Journal of Economic History* 898-915.

<sup>147</sup> Federman (n 64); Lahey and Salter (n 119).

<sup>148</sup> Federman (n 64), 169.

[b]ecause of their private character [that] these economic actors can commit massive violations of human rights with total impunity in different parts of the world . . . [and b]ecause such actors are at the core of the loss in economic national sovereignty, their actions, no matter how offensive . . . are unlikely to collide with consideration of national interest or security that might otherwise prompt the corrective or punitive intervention of the state.<sup>149</sup>

The TNC has been deconstructed as a raced, gendered entity constructed in the image of the Eurocentric male subject.<sup>150</sup> Moreover, the corporation enjoys a complex kind of legal disembodiment impossible even for the white European property-owning male and is simultaneously the very personification of capitalism.<sup>151</sup> Accordingly, it is the corporation, rather than the human being, that supplies the ultimate instantiation of liberal law's idealised person.<sup>152</sup> And it is the TNC that is the apotheosis of the corporation's disembodied power to evade accountability by 'disaggregating' into distinguishable units, each constituting a separate legal person.<sup>153</sup> It is this

capacity of [TNCs] to organise their legal form in such a way as to avoid responsibility for harm . . . [that is such] a cause for concern. In the context of corporate groups, the avoidance of responsibility can be achieved by interposing a separate legal entity between the victims and the ultimate controller of the group, be it a parent company or its controlling shareholders. Such a use of corporate separation can also be used to 'hide' the controlling enterprise from being present in the jurisdiction where the harm has occurred, thereby making litigation against it harder. Though in legal terms such devices are entirely normal and useful for the control of investment risks they are also likely to externalise other risks, in particular risk of harm, in morally and socially unacceptable ways.<sup>154</sup>

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<sup>149</sup> De Sousa Santos (n 22) at 268.

<sup>150</sup> Belcher has argued that 'a cursory glance at the history of English company law reveals the maleness of the company... Although corporate legal theory has always used the seemingly gender neutral formula of the company as a separate legal person, at the birth of this concept the person was male': A Belcher, 'The "gendered company" revisited', in Jones et al (n 103) at 65. The corporation is also a thoroughly racial construction: Federman (n 64).

<sup>151</sup> Gear argues that '[t]he corporation is quintessentially disembodied and also the ultimate personification of market imperatives, presenting a form of subjectivity that perfectly fits, expresses, facilitates and perhaps even intensifies the priorities of capitalism itself': Gear (n 115) at 97. See also, M Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital,' (2003) 14 *Law and Critique* 147-165.

<sup>152</sup> 'The very design of the corporation as a legal form can be read as an analogue to the idealised characteristics of European (and colonial) masculinity: separate legal personality, limited liability and the separation between ownership and control—as well as the legal duty placed upon company directors to pursue profit above all else—are legible as direct analogues to the mythic white, European male': A Gear, 'Deconstructing *Anthropos*: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26/3 *Law and Critique* 225-249 at 242.

<sup>153</sup> Such multiplicity gives rise to legal complications concerning 'the corporate veil': P Muchlinski, 'Limited liability and multinational enterprises: a case for reform?' (2010) 34 *Cambridge Journal of Economics* 915-928, at 916. Nor is this dilemma satisfactorily addressed by the development of an enterprise liability-based approach, notwithstanding the fact that the approach has given rise to a less narrow interpretation of corporate veil jurisprudence. Cases of 'lifting' or 'piercing' the corporate veil still overwhelmingly concern the use of a corporation as a means of fraud—and 'the courts are reluctant to go beyond this narrow range of exceptions [in order] to maintain the strict integrity of entity doctrine': *ibid*, 919. In short, as Dagerman and Schellnhuber argue, when it comes to TNCs, 'what often is considered a well-balanced legal-financial construction has an asymmetric and unbalanced foundation' (at E556): 'the specific legal-financial framework . . . grants sweeping power to the shareholders, who invest in, influence, and determine (through the pressure of the demand for immediate profits) the course of the company but actively blocks feedback . . . from any system that is or may be affected by the company's decisions and actions. In other words . . . potentially stabilizing feedback loops that could confine unsustainable runaway dynamics are blocked' (*ibid*): J Dagerman and HJ Schellnhuber, 'Energy Systems Transformation' (2013) *PNAS* E549-E558 (available at [www.pnas.org/cgi/doi/10.1073/pnas.1219791110](http://www.pnas.org/cgi/doi/10.1073/pnas.1219791110)).

<sup>154</sup> Muchlinski, (n 153) at 916.

The politics of rationalistic disembodiment central to law produce the idiosyncratic, complex and mutable ‘disembodiment’<sup>155</sup> of the corporate form as a decisive advantage in a pathologically uneven global order—and has its origins firmly in colonial imperatives.<sup>156</sup> Dangerman and Schellnhuber make explicit the intimacy between the structure of the corporate form and the imperatives of coloniality. They argue, referring to the origin of the earliest public corporation (the Dutch East India Company, in 1602) that:

Its owners neither wished nor expected to be confronted with the legal consequences of the actions and omissions of the economic entity in which they invested. In fact, they were not supposed to bear these consequences—these were colonial times. In an era when Europeans were discovering the existence of entire continents, the world appeared to have an endlessly receding horizon, and the indigenous people of the colonies were not necessarily considered important, let alone equal. In other words, when the shareholder company structure was formed, there was little reason to take into account a rationale for stabilizing feedback mechanisms ... Then and now, companies serve as legal vehicles for generating immediate profits for shareholders and allowing investors to reap the benefits of expansion ... without being confronted by the consequences of such harvesting dynamics.<sup>157</sup>

The legal structure of the TNC, emphatically, took shape as a tool of colonialism and the TNC’s disembodiment and the related mutability of dematerialised capital in a borderless global order for capital are thus entirely *at one* with the ideologically constructed exclusions and expulsions afflicting the marginalised ‘others’ which are so familiar to the injustices of an uneven juridical order. Legal personhood, in this light, far from being a neutral technicality, is legible as a legal technique of capitalist power.

#### 4 JURISDICTION: PATTERNS OF IDEOLOGICAL PRIORITISATION

In this section, our attention turns to the operation of jurisdiction as another legal construct, a ‘gate’ through which law’s privilege(s) is/are operationalised or denied in complex interaction with the privileges and exclusions created by legal personhood.

Our engagement with jurisdiction and jurisdictional technique is predominantly theoretical as we aim to discern key patterns of law’s construction of authority and control, selectively, over subjects and spatial realms.<sup>158</sup> Our interest lies in exposing links between patterns in the construction, delimitation and exercise of authority. We are not here concerned with taxonomic listings associated with doctrinal studies of jurisdiction,<sup>159</sup> but with the structural technologies and metaphysics of jurisdiction that in McVeigh’s words ‘articulate both the potentiality of law and the conditions of its exercise’.<sup>160</sup>

##### 4a Jurisdiction: Inaugurating law, shaping authority

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<sup>155</sup> Halewood (n 108) at 1335.

<sup>156</sup> Dangerman and Schellnhuber (n 153) E556.

<sup>157</sup> Ibid.

<sup>158</sup> S Dorsett and S McVeigh, ‘Jurisprudences of Jurisdiction: Matters of Public Authority’ (2015) 23/4 *Griffith Law Review* 569-588, at 569.

<sup>159</sup> Such studies already exist: FA Mann, ‘The Doctrine of Jurisdiction in International Law’ *Studies in International Law* (Oxford, Clarendon 1973); C Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015) (2<sup>nd</sup> edn.), this section aligns more closely with S McVeigh (ed.) *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 3.

<sup>160</sup> McVeigh, *ibid*, at *i*. For an analysis of jurisdiction as a legal-political amalgam, see A Kaushal, ‘The Politics of Jurisdiction’ (2015) 78/5 *Modern Law Review* 759-792.

We begin our discussion of jurisdiction by positioning it as a construct that purports to inaugurate law and bring it into existence.<sup>161</sup> Jurisdiction, conceived of as the power ‘to speak the law’,<sup>162</sup> is thought to produce and define law’s boundaries and subjects and to determine the way in which the sovereign state’s legal authority is ordered.<sup>163</sup> In most cases, problems of jurisdiction are problems about the limits of the exercise of legitimate authority.<sup>164</sup>

As a tool of government, jurisdiction actively works to produce ‘something’,<sup>165</sup> and in doing so expresses an implicit assessment of (about/) ‘value’ understood in terms of state interest.<sup>166</sup> A closer examination of the specific issues over which jurisdictional powers are exercised reveals that the authorisation of law closely relates to the construction of law’s purpose and imputed intention,<sup>167</sup> and it is this construction of purpose and its associated values that concerns us most for the purposes of our present argument. As was just noted, jurisdiction both inaugurates, shapes and expresses authority<sup>168</sup> and produces juridical and social identities.<sup>169</sup> This discursive<sup>170</sup> and inevitably material function is key to understanding the role played by jurisdictional practice in the production, definition, separation and exclusion of subjects and communities as targets of control.

As we move through a selected historical overview of jurisdictional technologies in the construction of authority, subjects and communities, two conceptual frames will be used. The first is the discursive and rhetorical distinction between ‘organic’ and ‘synthetic’ communities drawn by Ford.<sup>171</sup> The second is the evolution and role of the concept of territoriality in relation to jurisdiction—and the dyadic distinction drawn between egocentric (personal) and geocentric (territorial) legality.<sup>172</sup> While such binary contrasts can be destabilised by critique of binary categorisations in general, and there are in any case ‘too many ambiguous cases to allow for . . . a sharp bi-polar division’,<sup>173</sup> this twofold contrast nonetheless provides a useful epistemic lens through which to observe the historical relationship between territoriality and jurisdiction and to frame the current use of jurisdictional technique by the neoliberal order and its actors.

Organic communities are understood by Ford to be a natural outgrowth or development of a pre-existing group of peoples and their principles. The definition of such pre-existing groups

<sup>161</sup> Ibid; S Pasternak, ‘Jurisdiction and Settler Colonialism: Where Laws Meet’ (2014) 29/2 *Canadian Journal of Law and Society* Special Issue on Law and Decolonization, 145-161. And, as Sam Adelman observed in a comment on an earlier draft of this text, ‘In Hobbes’s mythical moment in which the social contract is struck, the Leviathan and his jurisdiction (his right to say the law) are coeval, and rights are ceded in exchange for protection—a tension that runs through liberalism like a recurring thread’.

<sup>162</sup> As a concept, jurisdiction is etymologically derived from ‘the saying of the law’, from the Latin *ius* (law) and *dicere* (‘to speak’).

<sup>163</sup> J Bomhoff, ‘The Reach of Rights: “The Foreign” and “The Private” in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements, 71 *Law and Contemporary Problems* 39-72 (Summer 2008). Available at: <https://scholarship.law.duke.edu/lcp/vol71/iss3/3/> Date of Last Access: 25<sup>th</sup> April 2018.

<sup>164</sup> R Thompson Ford, ‘Law’s Territory (A History of Jurisdiction)’ (1999) 97 *Michigan Law Review* 843-930 at 855.

<sup>165</sup> McVeigh, (n 159) at 4 and 39.

<sup>166</sup> M Keyes, ‘The Suppression of State Interests in International Litigation’ in McVeigh (n 159).

<sup>167</sup> Ibid.

<sup>168</sup> Dorsett and McVeigh (n 158) at 569.

<sup>169</sup> Ford (n 164) at 844, developed later in this section when examining the relationship between jurisdiction and territory.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid: ‘I must emphasize that the opposition described above is a conceptual distinction between jurisdictions. The opposition exists in the realm of rhetoric and discourse. It guides our perceptions and our actions, and may be more or less accurate way of describing the world. More importantly, its usefulness may depend less on its descriptive accuracy and more on its effectiveness as an epistemological filter. The dyad may not describe what we experience. Rather, it may influence how we think about what we experience’ (at 862-3).

<sup>172</sup> The terms ‘egocentric’ and ‘geocentric’ discussed by De Sousa Santos are chosen over the more familiar terms ‘personal’ or ‘territorial’ jurisdiction because they reflect more accurately the use of jurisdictional technique by the TNC: B de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’ (1987) 14 *Journal of Law and Society* 279-302, at 281; 287.

<sup>173</sup> Ford (n 164) at 863.



is social and the space they occupy is thought of as ‘authentic’ and in some cases even as ‘sacred’.<sup>174</sup> Organic communities tend to be united by culture—including language, religion, social mores and/or ethnicity. They also appear to have a necessary (and therefore fundamental) relationship with the territory they occupy.<sup>175</sup> This assumption of a pre-political foundation for natural organic communities in turn fosters the concept of ‘organic jurisdiction’, which rests on the premise of respect for pre-existing natural social formations. The conception of the nation state evolved from this premise.<sup>176</sup>

By contrast, ‘synthetic communities’ and jurisdictions are described as artificial, technological creations that exist to serve a specific administrative purpose.<sup>177</sup> Synthetic jurisdictions are imposed on groups from the outside,<sup>178</sup> and are formulated around ‘the individual’ (instead of the collective)—a monad predominantly depicted as a rational, profit maximising citizen—which, as we have seen, is fundamental to the production of liberal legal subjects and neoliberal subjects alike: ‘Synthetic territory is fungible. Its occupants are mobile and rootless; they are rational profit maximizers and technocratic modern citizens’.<sup>179</sup>

Historically, communities and jurisdictions conformed predominantly to an organic, non-territorial typography. In pre-modern Europe, communities continued to be united by kinship rather than by territorial ties.<sup>180</sup> Jurisdiction was thus an attribute that flowed from a ‘personal’ status, or, as De Sousa Santos formulates it, jurisdiction was ‘egocentric’.<sup>181</sup> Thus, early modern European sovereignty was first ‘tribal’ and, later, ‘imperial’ and territory did not have the significance that would later attain through the formation of the sovereign, territorial nation state.<sup>182</sup> Two developments changed this conception of sovereignty: First, the rational, humanist movement, which marked the birth of the ‘individual’,<sup>183</sup> and, secondly, the development of cartography.<sup>184</sup>

The mapping of territory transformed the focus of the connection between the sovereign authority (through jurisdiction) from personal status (clerics, feudal lords and merchants had separate courts in earlier European political formations) to an initially political and, later, to a territorial connection.<sup>185</sup> The concept of territorial jurisdiction thus evolved alongside that of the territorial nation-state and a territorially bounded spatial connection between the state and the

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<sup>174</sup> For example, this is often stated of indigenous peoples: ‘[I]ndigenous peoples... have an intimate connection to the land; the rationale for talking about who they are is tied to the land’: Stella Tamang, Indigenous leader, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). See also United Nations Declaration on the Rights of Indigenous Peoples, Arts 28 and 29.

<sup>175</sup> The best example is perhaps that of Israelis and Palestinians, and their relationship with the Promised Land and the Holy City of Jerusalem: Ford (n 164) at 850.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid. Ford gives the example of electoral districts, made for administrative convenience (at 861). We could also add the partition of Africa at the Conference of Berlin, redrawing the map of the continent for the convenience of the European powers, in a purely artificial, synthetic, fashion: see R McCorquodale and R Pangalangan, ‘Pushing the Limitations of Territorial Boundaries’ (2001) 12/5 *European Journal of International Law* 867-888, at 878, recalling the partition of Africa.

<sup>179</sup> Ford (n 164) at 861.

<sup>180</sup> Ford, *ibid.*, at 873, citing Maine: ‘it is ... not true that the territorial character of sovereignty was always recognised’: H Maine, *Ancient Law* (Arizona: University of Arizona Press 1986 (1864)) at 98-99: The ruler of a nation was ‘the king of a people, and not king of a territory’ (Ford, *ibid.*). Maine, as cited by Ford, explains that the origin of territoriality can be found with the Capetian dynasty whose sovereign evolved from the King of the Franks—a people—to the King of France—a territory: Maine, *ibid.*, 103-4. This model was later adopted in England by the Norman conquerors: Ford, *ibid.*; Maine, *ibid.*, at 104.

<sup>181</sup> De Sousa Santos (172) 292.

<sup>182</sup> Ford (n 164) at 842, notwithstanding the existence of early European city-states.

<sup>183</sup> W Mignolo, *The Dark Side of The Renaissance: Literacy, Territoriality and Colonization* (Ann Arbor: University of Michigan Press, 1995).

<sup>184</sup> Ford (n 164) at 844.

<sup>185</sup> Ibid.

subject became the cornerstone of the modern nation-building project.<sup>186</sup> In this project, the nation-state featured as a self-regulating homeland,<sup>187</sup> and jurisdictional technique articulated a political (and geographic/spatial) division of the world and the limits of each sovereign state's authority and power.<sup>188</sup> Cartography enabled the marking of territory, and with it the creation and policing of geographical borders that 'accurately' demarcated the reach of the sovereign's authority through the emergence of 'jurisdiction as a technology'.<sup>189</sup> The mapping of Europe, and, later, of the wider world, signalled the emergence of a new typology of jurisdictional, territorial and geocentric legality. This development did not, however, eliminate personal or egocentric jurisdictional technique—when European states expanded their imperial ambitions overseas both personal and territorial (egocentric and geocentric) models of jurisdiction were deployed, as and when required, in the service of dominating non-European subjects and appropriating their land.<sup>190</sup> Jurisdictional technique was thus decisive in shaping the new national polity's authority<sup>191</sup> and in the production of forms of privileged and subjected political and social identity.<sup>192</sup> Such technique was also central to the claim and exercise of *dominium*, and to access to, and control of, natural resources to finance wars and the expansion of European empires first—and later—to fuel the Industrial Revolution in Europe.<sup>193</sup>

Territorial jurisdiction, therefore, as we now understand it, is not only a relatively recent creation, but owes its current ubiquity and dominance to the central role it played in the creation of the modern nation state<sup>194</sup>—and to its legitimating function in facilitating capitalism, imperialism and the contemporary neoliberal global order.<sup>195</sup>

#### 4b Sovereignty and public authority: Jurisdiction as othering (and belonging)

We noted earlier that jurisdiction as a materio-discursive practice and tool of government shapes authority in particular ways. Authority was not, however, in this context, always linked to sovereignty.<sup>196</sup> Indeed, public authority was historically often separate from the civil authority of the sovereign territorial state.<sup>197</sup> Mediaeval jurists' characterisation of authority, for example, drew distinctions between the Crown, the Church and the merchant jurisdictions, and delineated a map of power between different orders—each representing different layers of authority.<sup>198</sup> Later, during the colonial expansion, other legal (corporate) subjects (of which the East India Company is the best known example) held authority without sovereignty.<sup>199</sup> Public authority is accordingly perhaps better understood as a status-signifier pointing to an assemblage of different jurisdictional practices and devices and is not necessarily to be automatically understood as

<sup>186</sup> Ibid, at 844, citing W Kymlica, *Liberalism, Community and Culture* (Oxford: Clarendon, 1991).

<sup>187</sup> Cutler (n 84).

<sup>188</sup> D Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21/3 *International History Review* 569–591.

<sup>189</sup> Ford (n 164) at 867.

<sup>190</sup> McCorquodale and Pangalangan (n 178) at 878.

<sup>191</sup> Dorsett and McVeigh (n 158) at 569.

<sup>192</sup> 'Deciding who governs where—the basic jurisdictional question—is not only important in itself but also has the effect of determining *how* something is governed': M Valverde, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14/1 *Criminology and Criminal Justice* 379–391 at 382. See also, Ford (n 164) at 844. This theme is developed later in this section when examining the relationship of jurisdiction with territory.

<sup>193</sup> Blanco and Razzaque (n 58) at 39–43.

<sup>194</sup> Ford (n 164) at 873 citing Maine (n 180) at 98–99.

<sup>195</sup> Although Marks (n 70) in her analysis of Hardt and Negri (n 70), observes that 'a process of deterritorialisation has occurred with respect to earlier systems of exploitation and exclusion'—at 463.

<sup>196</sup> Dorsett and McVeigh (n 158) at 569.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid, at 572.

<sup>199</sup> E Blanco, 'State owned oil companies, North-South and South-South perspectives on investment' in J Razzaque, J Shawkat and JH Bhuiyan (eds.) *International Natural Resources Law, Investment and Sustainability* (Abingdon: Routledge, 2017) 203–334, at 203–5 discussing the power and influence of the East India Company. See also, A Wild, *The East India Company: Trade and Conquest from 1600* (Glasgow: Harper Collins, 1999); McLean (n 43).

invoking ‘sovereignty’ or as dependent on or derivative from it.<sup>200</sup> Jurisdiction accordingly ‘speaks’ and mediates authority, even in cases where the authority in question is not sovereign.

Despite the fact that authority and sovereignty did not always coincide during the colonial expansion, sovereignty nonetheless became a crucial mechanism in the subjection of native populations in the colonies. Sovereignty provided a discourse that ‘legitimised’ the exercise of power and the ‘right’ of European colonisers to assert ‘authority’ over non-Europeans.<sup>201</sup> This hierarchical set of relations was operationalised through a series of legal constructions and discursive ploys, key amongst which is the idea that in order to be welcomed as a partner in the family of nations, a potential ‘sovereign state’ had to possess legal personality.<sup>202</sup> However, legal personality—as was implied in the previous discussion of legal personhood—was selectively bestowed. In line with the patterns identified above in relation to law’s paradigmatic actor, prospective sovereign states had to share characteristics preordained by the European powers, such as rationality—as well as to conform to certain requirements concerning race and religion.<sup>203</sup> Sovereignty, in short, was defined precisely in such a way that it could be denied to the non-European world and was deployed for ‘othering’ non-European subjects, who were denied the constructed civilisational maturity and rationality of Europe.<sup>204</sup>

Predictably, and also in powerful continuity with the ideological co-constitution of personhood and property discussed above, the denial of the legal personality to, and, accordingly, the denial of the sovereignty of non-European peoples, enabled a particular type of legal dispossession.<sup>205</sup> Non-Europeans were denied rights to territory except as consented to and carefully managed by the European sovereign through the development of territorial title—a concept that transformed territory first into property, and then, later, into a commodity that could be disposed of by the (European) owner-sovereign state.

Alongside this selective attribution of ‘sovereignty’ and legal personality, the jurisdictional technique deployed by the colonial powers imposed artificial (synthetic, in our earlier discussion) demarcations upon the indigenous under the pretext of recognising their separate subjectivity as a community—a move designed to differentiate between coloniser and colonised and to control the latter. Jurisdictional technique, in this way, imposed an order and authority that recognised some of the organic social characteristics of native populations but ignored others—just as the politics of selective disembodiment discussed above simultaneously recognises and diminishes the significance of human corporeality. Constructed as a non-sovereign people devoid of full legal personality, communities such as the Indians in the Americas were to be regulated by a different system of rules designated as ‘natural law’, since international law was reserved for the relationships between sovereign states.<sup>206</sup> A centre and a periphery were thus constructed—a familiar pattern of privilege and marginalisation. Meanwhile, the racialisation operated by the privileging of distinctively European rationalistic subjectivity precluded non-Europeans from exercising authority precisely on the basis that their lack of certain characteristics rendered them incapable of holding sovereign power. The creation of empires through the colonial encounter was thus a site for the production of identity and difference,<sup>207</sup> where jurisdiction operated

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<sup>200</sup> Dorsett and McVeigh (n 158) at 569.

<sup>201</sup> Anghie (n 57) at 332.

<sup>202</sup> GJ Ames, *The Globe Encompassed: The Age of European Discovery, 1500-1700* (Upper Saddle River, NJ: Pearson, 2007) at 102-103.

<sup>203</sup> These characteristics are closely related to the imputation of organic community: see discussion and references in section 4a, above.

<sup>204</sup> Kapur (n 134); Kapur (n 140) at 541.

<sup>205</sup> Quijano (n 35). The point is also made by E Said, *Culture and Imperialism* (London: Chatto and Windus, 1993).

<sup>206</sup> See, A Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27/5 *Third World Quarterly* 739-753, at 743 discussing Francisco de Vitoria and the School of Salamanca’s role in the creation of international law. Anghie explains how Vitoria, often remembered as the champion of the rights of indigenous non-European peoples—saw the indigenous as possessing a type of ‘imperfect rationality’—and thus as being subject to natural law but in need of, by virtue of their ‘imperfections’, the intervention of the Spanish.

<sup>207</sup> See, generally, Mignolo (n 38) and Quijano (n 35).

through an assemblage of techniques that enabled European authority over non-European subjects *and* legitimated the creation of bordered, walled communities,<sup>208</sup> while sovereignty was constructed so as to predetermine the issue of ‘who’ decides what is ‘just’.<sup>209</sup> These patterns find renewed critical resonance in the current order of power, in which jurisdiction is deployed to the advantage of vast, neo-colonial corporate assemblages in an age of rapid border-hardening and the proliferation of walls and barriers.<sup>210</sup>

#### 4c Jurisdiction in the Neoliberal Order: The Cartography of Power

While a geographic vision and understanding of sovereignty and territory has dominated legal discourse for centuries<sup>211</sup> questions of spatial injustice gain new traction, as we have seen, in the face of escalating globalisation under the conditions of which borders are—in a particularly xenophobic and exclusionary way—increasingly at the forefront of political and legal discourse and proliferating as modes of material expulsion and control. The world is not, in reality, a ‘global village’ and while much scholarship on globalisation focuses on the weakening of state authority over its territory through the contemporary period,<sup>212</sup> the constructs of territoriality<sup>213</sup> and state sovereignty continue to play important, ideological roles in the creation of privilege and exclusion. This point is highly relevant to the contrast between the two contemporary developments at the heart of our concern: the ability of TNCs to cross borders instantaneously while selectively seeking the protection of walled citadels of law to avoid accountability, and the plight of migrants and refugees facing barriers and boundaries painfully inhospitable to them and to their corporeal plight. Haunting our reflections on the contemporary legal order is the underlying background contrast between materially different kinds of bodies when they encounter visible and invisible boundaries of jurisdiction: Vulnerable corporeally specific beings come up against fenced borders, barbed wire, perilous seas, policed *zones d’attente* of exclusion and control, and rules of entry or rejection. By contrast, in a ‘borderless world for global capital’,<sup>214</sup> TNCs—as complex corporate assemblages—can traverse jurisdictional lines with relative ease and impunity, shifting jurisdictions at will and demonstrating unrivalled forms of disembodied—yet profoundly material—legal agency.<sup>215</sup>

There is nothing new, of course, about law’s material action on bodies—or about its striation of space. Marking out space, driving out those construed as undesirable and/or barring

<sup>208</sup> M Paz, ‘The Law of Walls’ (2017) 28/2 *European Journal of International Law*; S Sassen, ‘Excavating Power: In Search of Frontier Zones and New Actors’ (2000) 17/1 *Theory, Culture & Society* 163-170; S Sassen, *Cities in the World Economy* (Thousand Oaks CA: Sage, 2000).

<sup>209</sup> This point is made by Marks when she discusses the change in the understanding of ‘sovereignty’ from the early formulations of classical international law to the new formulations where it ceases to be solely an attribute of the nation state and becomes an ‘attribute of global power’: Marks (n 70) at 466.

<sup>210</sup> W Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010); Marshall (n 10); J Sonnevend, ‘Our New Walls: The Rise of Separation Barriers in the Age of Globalization’, May 2017, *e-International Relations* (available at: <http://www.e-ir.info/2017/05/25/our-new-walls-the-rise-of-separation-barriers-in-the-age-of-globalization/> Date of last access 11<sup>th</sup> December 2017); S Granados, Z Murphy, K Schaul, A Faiola, *Raising Barriers: A New Age of Walls*—a multimedia exploration: available at <https://www.washingtonpost.com/graphics/world/border-barriers/global-illegal-immigration-prevention/> Date of last access 11<sup>th</sup> December 2017.

<sup>211</sup> K Raustiala, ‘The Geography of Justice’ (2005) *Fordham Law Review* 101-155. Raustiala points out that ‘[t]he supposition that law and legal remedies are connected to, or limited by, territorial location—a concept I term “legal spatiality”—is commonplace and intuitive . . . . The concept is suffused throughout the law. Yet, perhaps precisely because it so commonplace, the assumptions embedded in legal spatiality are rarely examined and surprisingly ill-defended’ (at 102-3).

<sup>212</sup> S Sassen, ‘When Territory Deborders Territoriality’ (2013) 1/1 *Territory, Politics, Governance* 21-45 at 22. Sassen lists a range of scholarship addressing this problem.

<sup>213</sup> Territoriality is often deployed as a legal construct that marks the exclusive authority of a state over its territory: Sassen, *ibid*, at 23. Sassen ‘[seeks] to escape [the] analytic flattening of territory into one historical instantiation, national-state territory, by conceptualizing territory as a capability with embedded logics of power and of claim making’, *ibid*.

<sup>214</sup> Baxi (n 24) at 246.

<sup>215</sup> Blumberg (n 115).

their entry is an ancient human practice and a well-rehearsed juridical strategy.<sup>216</sup> As walls now rise rapidly across the world, those facing mechanisms of expulsive power<sup>217</sup> and a wave of contemporary state and corporate dispossessions and land grabs<sup>218</sup> face unprecedented and intensifying consolidations of control mediated by increasingly technologically sophisticated methods of surveillance regulation—all in conditions of entrenched and global unevenness.<sup>219</sup>

The organisation of territorial jurisdiction, as our analysis has suggested, is central to such dynamics as a technique for the construction of the reach of state power and/or of related rights. States operate as core facilitators of elite capitalistic privilege in the global neoliberal order.<sup>220</sup> In this space law itself no longer functions on a single scale, the scale of the state—even notionally, because a plethora of complex transnational organisational assemblages operate in relation to authority and power, often in the shadows of legality.<sup>221</sup> The density of transnational connections is such that a very different cartography of power also now operates, one in which international and supranational institutions and various networks operate in complex complicity with—and differing degrees of tension with—nation states, while corporate elites decisively shape the political and economic destiny of billions. This is no longer a world order, therefore, where dominant states violate the sovereignty of weaker countries with traditional strategies alone—instead, new forms of debordering overlay and exceed older, traditional approaches.<sup>222</sup> Territoriality, the legal construct marking the exclusive authority of a state over a territory, is increasingly malleable and selectively hollowed out. What remains is barely more, in some situations, than a mutable mirage emerging and disappearing selectively according to the dictates of corporate neoliberalism and its privileged transnational corporate subject.<sup>223</sup> Accordingly, the ‘end of geography’<sup>224</sup> implied by the denationalising of territory is a highly selective process. Territoriality remains very much alive as a barrier protecting the insider, howsoever constructed—most especially the ultimate juridical insider: the TNC.

The new cartography of power mapped out by global capital and enabled by the neoliberal state allows TNCs to exploit jurisdictional technique, avoiding territorial laws precisely by resorting to personal, ‘egocentric legality’ (in De Sousa Santos’s terms).<sup>225</sup> A complicated web of ‘legal enclosures’ in the form of various corporation-friendly codes of conduct<sup>226</sup> and

<sup>216</sup> For an analysis of contemporary modes of neoliberal expulsion, see Sassen (n 2). For earlier patterns, see Wood (n 66) at 67–94.

<sup>217</sup> Sassen (n 2) at 12.

<sup>218</sup> P McMichael, ‘The Land Grab and Corporate Food Regime Restructuring’ (2012) 39/3-4 *The Journal of Peasant Studies* 681–701; C Corson and KI MacDonald, ‘Enclosing the Global Commons: the Convention on Biological Diversity and Green Grabbing’ (2012) 39/2 *The Journal of Peasant Studies* 263–83.

<sup>219</sup> Radhakrishnan (n 9).

<sup>220</sup> Brabazon (n 73).

<sup>221</sup> De Sousa Santos (172) at 287.

<sup>222</sup> S Sassen, ‘Borders, Walls and Crumbling Sovereignty’ (2012) 40/1 *Political Theory* 116–122, at 118.

<sup>223</sup> S Sassen, ‘Bordering capabilities versus borders: Implications for national borders’ (2009) 30/3 *Michigan Journal of International Law* 567–597.

<sup>224</sup> A term coined by Daniel Bethlehem, which despite its resonance with Fukayama’s ‘End of History’, draws more on Friedman’s *The World is Flat*: D Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’ (2014) 25/1 *European Journal of International Law* 9–24, at 11. Bethlehem refers, of course, to F Fukayama, *The End of History and the Last Man* (New York: McMillan—The Free Press, 1992) and to T Friedman, *The World Is Flat: A Brief History of the Globalized World in the Twenty-First Century* (New York: Farrar, Strauss and Giroux, 2005).

<sup>225</sup> See above (n 172).

<sup>226</sup> These codes are overwhelmingly voluntarist, in large part due to corporate resistance to the imposition of binding standards: See UNHRCOR, Report of the Special Representative of the Secretary-General [SRSG] On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/11/13 (2009); UN Global Compact: [unglobalcompact.org](http://unglobalcompact.org) (Date of Last Access 25<sup>th</sup> April 2018); OECD Declaration on International Investment and Multinational Enterprises (Ministerial Meeting), The OECD Guidelines for Multinational Enterprises (25<sup>th</sup> May 2011); The Voluntary Principles on Security and Human Rights: [voluntaryprinciples.org](http://voluntaryprinciples.org)

privatised jurisdictional rules<sup>227</sup> allows TNCs to oust the application of national state-based law and the territorial jurisdiction of state courts.<sup>228</sup> Sovereignty is thus ‘decentred’ and territory ‘denationalised’<sup>229</sup> —developments revealing, on closer examination, law’s continuing complicity in the prioritisation of the economic interests of powerful elites. Earlier patterns are recognisable in these developments, and the creation of a privileged and now paradoxically acentric ‘centre’ presses to the periphery (in multiple contemporary senses) ‘the others’ to the dominant corporate actor. The constructed ‘centre’ is occupied by the TNC as key beneficiary of the system, while the ‘periphery’ is constructed as the ‘other-space’ of the poor, migrants, workers, refugees, indigenous peoples, the environment, and other living and non-human species knocking at the gates of the walled cities of law’s circle of concern.<sup>230</sup>

## 5 CONCLUSION

We have offered an admittedly brief and selective critical reading of legal personhood and jurisdiction, construing them as techniques of privilege and predation and as core elements in the production of a highly uneven, unjust legal global order that reflects and amplifies existing patterns of power. Like other legal constructs (re)presented as neutral, technical artefacts of law, legal personhood and jurisdictional technique reflect the historical and contemporary imprint of privileged Eurocentric—and then Western (Global North) mastery—a pattern subtending and characterising the Anthropocene<sup>231</sup> and its patterns of coloniality.<sup>232</sup> Indeed, the Anthropocene concept itself has been accused of a ‘somewhat hidden Eurocentrism’<sup>233</sup>—and criticised, along with ‘much of the analytical apparatus surrounding it—[for representing] an effort to expand (rather homogenized) European historical experiences, frameworks and chronologies onto the rest of the world ... and [for hiding] a disturbing extension of colonial discourse into a postcolonial world’.<sup>234</sup>

We have drawn attention to the persistent influence of an underlying rationalistic, disembodied Eurocentric archetype ultimately instantiated by the TNC. We have traced, in this process, threads of ideological and material continuity between coloniality, capitalism and the neoliberal order, and we have noted that material, corporeal exposure to Anthropocene risks (which include the climate crisis) is, and remains, emphatically uneven.<sup>235</sup>

This unevenness is deeply troubling. As the legal-economic incarnation of capitalist power, the TNC’s privilege operates in stark contrast with the proliferation of walls and border-hardening against marginalised ‘others’. The long arc of law’s complicity in the production of

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(Date of Last Access, 25<sup>th</sup> April 2018); P Simons, ‘Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes’ (2004) 59 *Relations Industrielles/Industrial Relations* 101-141.

<sup>227</sup> Investment Arbitration Tribunals, for example. These have proliferated extensively: S Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996), at 15-16.

<sup>228</sup> C Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: CUP, 2003). M Sonarajah describes investment law as a struggle between developed and developing countries: M Sonarajah, *The international Law of Foreign Investment* (New York: Cambridge University Press, 2010).

<sup>229</sup> Sassen (n 227) at 29-30. Sassen points out, relatedly, that ‘[a] rather peculiar passion for legality (and lawyers) drives the globalization of the corporate economy, and there has been a massive amount of legal innovation around the growth of globalization’: *ibid*, at 6.

<sup>230</sup> Human Rights litigation against TNCs under the Alien Tort Claims Act in the USA provides a good example of this ‘legal knocking at the doors’.

<sup>231</sup> C Gonzalez, ‘Bridging the North-South Divide: International Environmental Law in the Anthropocene’ (2015) 32 *Pace Environmental Law Review* 407-34.

<sup>232</sup> Malm and Hornborg (n 4); Grear, (n 152); and although he ultimately affirms a negative universalism, D Chakrabarty, ‘The Climate of history: Four theses’ (2009) 35 *Critical Inquiry* 35: 197-222. See also, KD Morrison, ‘Provincializing the Anthropocene’ (2015) 673 *Seminar* 75, 75-76.

<sup>233</sup> Morrison, *ibid*, 75.

<sup>234</sup> Morrison, *ibid*, 75-76.

<sup>235</sup> Malm and Hornborg (n 4).



global injustice and a ‘borderless world for global capital’<sup>236</sup> makes the ‘walling of the state’ a particularly cruel response to the ‘fear of the dangerous alien’ now re-igniting the fantasy of the nation state as the besieged homeland sheltering the threatened national ‘we’ within its walls<sup>237</sup>—whether that ‘alien’ is imagined to be the climate migrant, the political refugee or the economically dispossessed ‘other’.

Our reflection—by foregrounding key historical patterns—suggests that the unrivalled powers of TNCs to exploit the advantages of legal personality and evade jurisdictional accountability by utilising jurisdictional technique operate as a manifestation of power and oppression that ultimately takes significant energy from selectively weaponised notions of rationality and territoriality. Future research and theorisation exploring the contrast between law’s ultimate insiders and its co-symptomatically produced outsiders should, we suggest, focus particular attention on the feats of selectivity cloaked by law’s putatively neutral operations—and explore in more detail than has been possible here, personhood and jurisdiction as important levers of neoliberal exclusion and predation in the ‘postcolonial’ global order.

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<sup>236</sup> Baxi (n 24) at 246.

<sup>237</sup> Brown (n 210), 115-9. Brown argues that the projection of danger onto the alien both draws on and fuels a fantasy of containment for which walls are the ultimate icon’ (ibid, at 117). Thus we return, full circle, to the anxieties contextualising the beginning of our exploration.